



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

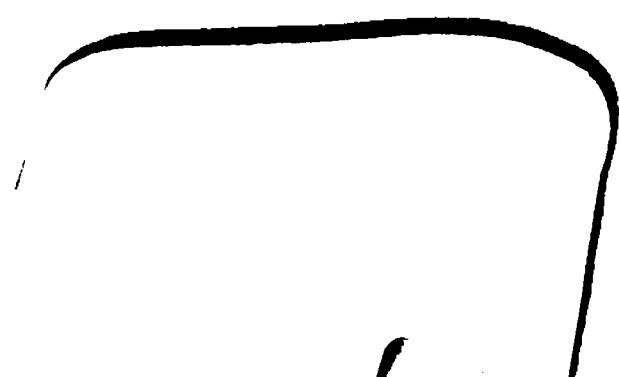
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

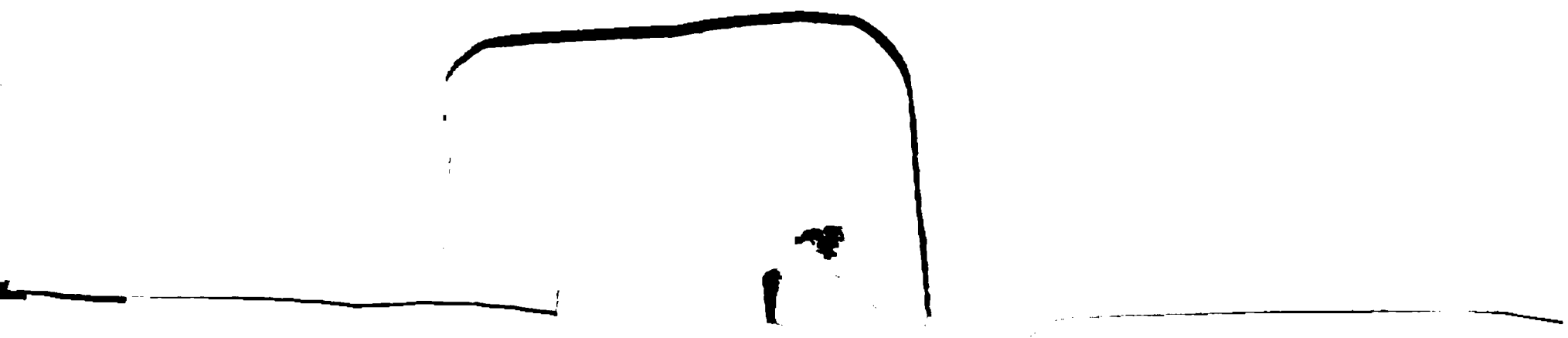
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



.





162

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

District Courts of the United States

WITHIN THE SECOND CIRCUIT.

BY ROBERT D. BENEDICT AND BENJ. LINCOLN BENEDICT.

VOLUME X.

NEW YORK:

BAKER, VOORHIS & CO.,

66 NASSAU STREET.

1882.

Entered according to Act of Congress, in the year eighteen hundred and eighty-two,
BY ROBERT D. BENEDICT,
In the office of the Librarian of Congress at Washington.

92321

*LIBRARY OF THE
LESLIE STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.*

BURLINGTON, VT.:
THE FREE PRESS ASSOCIATION,
PRINTERS.

The cases reported in this Volume are selected from the many in which opinions were handed down in the District Courts of the United States within the 2d Circuit, between July, 1878, and January, 1880, when the publication of the *Federal Reporter* began. The field of these Reports is so nearly covered by the *Reporter* that it seems at present unadvisable to continue them.

The author begs to return thanks to the members of the profession generally, and to the Admiralty Bar in particular, for the favor shown to the work in its previous volumes, and to announce that the present and 10th Volume closes the series of Benedict's Reports.

BROOKLYN, N. Y., June, 1882.

CASES

REPORTED IN THIS VOLUME.

A

A. B. Preston (The Tug) and Vanderbilt.....	607
Acadia (The Steamship).....	482
Albany and Ren. I. and S. Co. <i>ads.</i> Tuttle.....	449
Alexandria (The Steamship).....	101
A Quantity of Tobacco <i>ads.</i> The U. S.....	9
A Quantity of Manuf. Tobacco....	447
Archer (The Bark).....	99
Annie H. Smith (The Ship).....	110

B

Baltic (The Steamer).....	681
Barnes' Case	79
Beisenthal and Henschel's Case....	42
Bermuda (The Steamship)....	698
British America (The Ship).....	417
Brothers (The Bark).....	400
Blue Jacket, (The Ship).....	248

C

Chapman <i>ads.</i> Jaycox.....	517
C. F. Starin (The Propeller).....	494
City of New Bedford (The Steamer)	17
City of Hartford (The Steam-boat).....	150
Colon and Cargo (The Steamship)	60
Colon.....	366
Condon <i>v.</i> Murray.....	290
Countess of Dufferin (The Yacht)...	155
Cornwall (The Steamship).....	108
Clytie (The Yacht).....	588

D

Deer (The Steamboat).....	628
Dill <i>ads.</i> Int. Grain Ceiling Co.....	92
D. R. Martin (The Steamboat)....	582
Drew and Bucki <i>ads.</i> Smith.....	614

E

Edward Albro (The Bark).....	668
E. A. Packer (The Tug).....	520
Eggers and Janssen <i>ads.</i> McCarthy.	688
Eloina (The Bark).....	458
Energy (The Barge) and M. F. Winch.....	158
Endicott <i>v.</i> Renauld.....	582
E. W. Gorgas (The Tug).....	460, 541, 666

F

Fraser <i>ads.</i> The U. S	347
Fourteen Horses.	358
Four Cases <i>ads.</i> The U. S.....	371
F. Merwin (The Schooner).....	349, 403

G

Grain Ceiling Co. <i>v.</i> Dill.....	92
Gallagher <i>v.</i> Murray.....	290
Gen. Wm. McCandless (The Tug).	453
Grinnell <i>ads.</i> Sedgwick, Ass'e.	6
Gomez de Castro (The Brig).....	540
Gorgas (The Tug).....	460, 541, 666

H

Hammonia (The Steamship).....	512
Henry Trowbridge (The Bark)...	415
H. W. Edye (The Tug).....	238
Hutton <i>ads.</i> The U. S.....	268
Hus <i>v.</i> Kempf.....	231, 364

I

Innocenta (The Bark).....	410
Ins. Co. of N. A. <i>ads.</i> Neidlinger.	254
Int. Grain Ceiling Co. <i>v.</i> Dill.....	92

J

Janssen and Eggers <i>ads.</i> McCarthy	688
James Bowen and L. P. Dayton (The Tugs).....	480
James McMahon (The Tug).....	108

Jaycox v. Chapman	517
Jeremiah (The Brig).....	326
Jeremiah, The (Remnants of).....	338
John Bramall (The Steamship)....	495
John Cooker (The Tug) and Barge Eaton.....	488
John Neilson (The Barge) and Tug Packer....	520
Joseph Hall (The Propeller).....	246
J. W. Eaton (The Barge) and Tug J. Cooker.....	488

K

Kalmar (The Schooner).....	242
Kempf <i>ads.</i> Hus.....	231, 364

L

Lawrence's Case.....	4
Linder, Ass'ee, v. Lewis.....	49
Leary's Petition.....	197
Leonard v. Whitwill.....	638
Lilian M. Vigus (The Bark).....	385
L. P. Dayton and Bowen (The Tugs) and Scow No. 4.....	430
Lizzie Merry (The Barkentine)....	140
Lucia B. Ives (The Schooner)....	660

M

McCarthy v. Eggers and Janssen .	688
Mallory <i>ads.</i> Tarleton.....	46
Martha C. Burnite (The Sloop)....	196
Massachusetts (The Steamboat)...	177
Mellor's Case.....	58
Merwin (The Schooner).....	349, 403
Mike Norton and Titan (The Tugs).....	440
Minnie R. Childs (The Steam- boat).....	553
Monitor (The Steamboat)....	188
Moller <i>ads.</i> The U. S.....	189
Montauk (The Schooner).....	455
Moonachie (The Ferry-boat).....	532
Murray <i>ads.</i> Condon.....	290
Murray <i>ads.</i> Gallagher.....	290
M. F. Winch and Energy (The Barges)	158
M. R. Brazos (The Tug).....	435

N

Neidlinger v. Ins. Co. of N. A....	254
Nims and Long's Case.....	53
Novelty (The Steamboat).....	349
Norwich Transp. Co.'s Petition...	193
N. Y. N. H. & H. R. R. Co. <i>ads.</i> The U. S.....	144

O

One Hundred and Eighteen Sticks.	86
One Hundred and Seventeen Packages <i>ads.</i> The U. S.....	343
Orient (The Steamboat).....	620

P

People's Safe Dep. Co.'s Case	38
Petition of Norwich Transp. Co.	198
Petition of Leary.....	197
Petition of Wright.....	14
P. C. Schultz (The Steamboat)....	536
Pride of the Ocean (The Ship)....	610
Puig <i>ads.</i> Sleeper.....	181

Q

Quantity of Manuf. Tobacco.....	447
Quantity of Tobacco <i>ads.</i> The U. S.....	92

R

Remnants of The Jeremiah.....	338
Renauld <i>ads.</i> Endicott.....	582

S

Scow No. 4 and Tugs Bowen and Dayton.....	430
Sedgwick, Assignee, v. Grinnell...	6
Sen. Mike Norton (The Tug).....	440
Shand (The Ship).....	294
Sixteen Bbls. Spirits <i>ads.</i> The U. S.	484
Sleeper v. Puig.....	181
Sloga (The Brig).....	315
Smith v. Drew and Bucki....	614
Sumner's Case.....	34
Surplus and Remnants of The Jeremiah.....	338
Susan E. Voorhis (The Brig).....	380
Sykes' Case.....	162

T

Tappan <i>ads.</i> The U. S.....	284
Tarleton v. Mallory.....	46
T. F. Whiton (The Bark).....	369
The A. B. Preston and Vander- bilt.....	607
The Acadia.....	482
— Alexandria.....	101
— Annie H. Smith.....	110
— Archer.....	99
— Baltic.....	631

The Bermuda.....	698	The Susan E. Voorhis.....	380
— British America.....	417	— T. F. Whiton.	369
— Brothers.....	400	— Titan.....	440
— Blue Jacket	248	— Two Marys.....	558
— C. F. Starin.....	494	— Uncle Tom.....	234
— City of Hartford.....	150	— Vanderbilt.....	607
— City of New Bedford.....	17	— Veronica Madre.....	24
— Cornwall.....	108	— Vincenzo T.	228
— Countess of Dufferin.....	155	Titan and Mike Norton (The	
— Clytie.....	588	Tugs).....	440
— Colon and Cargo.....	60	Tilden <i>ads.</i> The U. S....	170, 547, 566
— Colon.....	366	Two Marys (The Schooner).....	558
— Deer.....	628	Two Trunks <i>ads.</i> The U. S.....	374
— D. R. Martin.....	582	Tuttle <i>v.</i> Alb. and R. Iron and	
— E. A. Packer.....	520	S. Co.....	449
— Edward Albro.....	668		
— Eloina.	458		
— Energy.....	158		
— E. W. Gorgas... ..	460		
— F. Merwin.....	349, 408		
— Gen. Wm. McCandless.....	453		
— Gomez de Castro.....	540		
— Gorgas.....	541, 666		
— Hammonia.....	512		
— Henry Trowbridge.....	415		
— H. W. Edye.....	238		
— Innocenta.....	410		
— James Bowen.....	430		
— James McMahon.....	108		
— Jeremiah.....	326		
— John Bramall.....	495		
— John Cooker.....	488		
— John Neilson.....	520		
— Joseph Hall.....	246		
— J. W. Eaton.....	488		
— Kalmar.....	242		
— Lilian M. Vigus.....	385		
— Lizzie Merry	140		
— L. P. Dayton.....	430		
— Lucia B. Ives.....	660		
— Martha C. Burnite.....	196		
— Massachusetts.....	177		
— Merwin.....	349, 408		
— Mike Norton.....	440		
— Minnie R. Childs.....	558		
— Monitor.....	188		
— Montauk.....	455		
— Moonachie	532		
— M. F. Winch.....	158		
— M. R. Brazos.....	485		
— Novelty.....	349		
— Orient.....	620		
— P. C. Schultz.....	536		
— Pride of the Ocean.....	610		
— Scow No. 4.....	430		
— Sen. Mike Norton.....	440		
— Shand.....	294		
— Sloga.....	315		

TABLE OF CASES CITED IN THIS VOLUME.

A

Aldridge v. Williams (3 Howard, 29)....272
 Alice Taintor, The (14 Blatchford, 225)...405
 America, The (11 Blatchford, 485).....102
 America, The (1 Lowell, 177).....244
 America, The (6 L. R. N. S. 264).....557
 Amerique, L., (Eng. L. R. 6 P. C. App.).. 74
 Amelie, The (6 Wallace, 27).....252
 Anglo-Indian, The (3 Aspinall M.C. 1).. 654
 A Quantity of Distilled Spirits (3 Benedict, 79).....436
 Archer, The (9 Benedict, 455)..... 99
 Atlantic, The (Newberry, 516).....671
 Atlas, The (2 Haggard, 57).....671
 Atlas, The (23 U. S. 302).....658
 Augusta, The (1 Dodson, 287).....676-684
 Aurora, The (1 Wheaton, 107).....687

B

Baker v. Manuf. Ins. Co. (2 Gray, 603)..258
 Baker v. Richardson (1 Cowen, 77).....346
 Baker v. Ward (3 Benedict, 497).....365
 Baltimore, The (8 Wallace, 385).....103
 Bamard The (3 Benedict 194).....457
 Blanché Page, The (7 Reporter, 326)....449
 Bradstreet v. Neptune Ins. Co. (3 Sumner, 604).....474
 Becherdass Ambaldaas, The (1 Lowell, 589).....387
 Beardsley v. Littell (14 Blatchford, 105).....279-80, 579
 Belsenthal's Case (14 Blatchford, 146) 44, 51
 Belle, The (1 Benedict, 317).....649
 Bell v. Morrison (1 Peters, 255).....574
 Benares, The (7 Notes of Ca. Suppl., 50).621
 Bias v. Chesapeake Ins. Co. (7 Cranch, 416).....262
 Birdsall v. Pixley (4 Wendell, 196).....280
 Briddon v. Gt. North. Railway Co. (28 L. J., N. S. 51).....314
 Brockett v. Brockett (2 Howard, 238).... 12
 Brockway v. Kinney (2 Johnson, 210).... 41
 Brooks v. Jenkins (3 McLean, 439).....175
 Brook v. Middleton (1 Campbell, 450)....346
 Bronson v. Kenney (3 McLean, 180).....280
 Bonaparte, The (8 Moore's P. C. 460)....677
 Borden v. Fitch (15 Johnson, 145).....474
 Brown's Case (112 Mass. 409).....221
 Brown v. Johnson (10 M. & W. 331).....186
 Bucker v. Klorketer (Abbott's Adm. 408).....338
 Bulkley v. Naumkeag Steam Co. (24 Howard, 392).....106
 Burnwell v. Knight, (51 Barbour, 267).... 41

C

Cadmus, The (Blatchf. and Howland, 145).....393
 Cadmus, The (2 Paine, 226).....399
 Caldwell v. The United States (8 Howard 366).....373
 Canton, The (1 Sprague, 440).....457
 Chancellor, The (4 L. T. N. S. 627).....649

Charlotte Raab, The (Brown's Ad'm. 453).....432, 601
 Cargo of Salt (4 Blatchford, 224).... 362
 Clark's Case (9 Wendell, 219).....219
 Clark v. Barnwell (12 Howard, 272).....229, 311, 320
 Carrington v. Pratt (18 Howard, 66).....630
 Castilia, The (1 Haggard, 60).....396
 Catawanteak, The (2 Benedict, 189)....392
 Central B'k of Georgetown v. Tayloe (2 Cranch, 427).....265
 C. H. Northam, The (13 Blatchford, 31)..179
 Clifton, The (3 Haggard, 118)..... 73
 Circassian, The (3 Benedict, 414).....680
 City of Berlin, The (37 Law Times Rep. 307)..... 74
 City of New York, The (3 Blatchford, 188).....665
 City of Washington, The (13 Blatchford, 410).....484
 Columbo, The (3 Blatchford, 521).....329
 Com. v. Deacon (10 S. & R. 125).....221
 Com. of Knox Co. v. Aspinwall (21 Howard 383).....276
 Comfort v. Johnson (10 Johnson, 101)...346
 Cont. Nat. B'k v. B'k of Commonwealth (50 N. Y. 586).....637
 Cromwell v. Co. of Sac. (94 U. S. 352).... 40
 Cope v. Doherty (2 De Gex & J. 614).508, 652
 Cory v. Boylston F. & M. Ins. Co. (101 Mass. 146) (9 Am. Rep. 14).....260
 Corn. Ex. Bank's Case (15 N. B. R. 481).. 59
 Cloutman v. Tunison (1 Sumner, 331)....392
 Cushing v. Laird (4 Benedict, 71)..... 96
 Cutter v. Wright (22 N. Y. 481).....157

D

Davis v. Wallace (3 Clifford, 123).....184
 Dennistoun v. Draper (5 Blatchford, 340)..... 97
 Dow's Case (18 Pa. 37).....221
 Douglass v. Eyre (Gilpin, 153).....398
 Dumfries, The (Swabey, 63).....649
 Duna, The (16 Ir. Jurist 358).....623

E

Earl Spencer, The (3 Aspinall, M. C. 4).....654
 Evans v. Parker (20 Wendell, 622)..... 96
 Emily B. Souder, The (7 Benedict, 550).. 74
 Elizabeth, The (2 Dodson, 411).....293
 Eloina, The (4 Fed. Reporter, 573).....101
 Edith, The (94 U. S. 518).....556
 Eleonora, The (17 Blatchford, 83-105)647-659
 Emancipation, The (1 W. Rob. 124).....671
 Enterprise, The (1 Lowell, 455).....624
 Eureka, The (2 Lowell, 420).....671-680
 Ex parte Judson (3 Blatchford, 39).....576
 Ex parte McNeil (13 Wallace, 242).....243-4
 Ex parte Smith (3 McLean, 121).....219, 220
 Eyster v. Gaff (91 U. S. 520)..... 39

F

Fanny, The (2 Lowell, 508).....557
 Flaherty v. Doane (1 Lowell, 150).....457
 Feronia, The (17 L. T. R. 620).....236
 Freeman, The Sch'r (18 Howard, 182)....105
 Funck v. Riddleman (2 Blatchford, 301)..265
 Forbes v. Murray (3 Benedict, 497).....365
 Forsyth v. Woods (11 Wallace, 436)..... 56
 Foster v. Milliner (50 Barbour, 395)..... 41

G

Galatea, The (6 Benedict, 259).....667
 Galloway C. Morris, The (2 Abb. U. S. R. 168).....457
 Granite State, The (3 Wallace, 310).....432
 Grant v. Norway (18 Eng. L. & E. 561)...105
 Gratitude, The (2 C. Rob. 361)..... 309
 Gen. Iron Screw C. Co. v. Schurmann, (29 L. R. Ch. 877).....503
 Gen. Sheridan, The (2 Benedict, 294)....104
 Greenough's Case (31 Vt. 279).....221
 Grenar v. Meyer (2 Blatchford and Howland, 203).....389
 George, The (1 Sumner, 150).....686
 Girdlestone v. Brighton Aq. Co. (L. R. 3 Ex. Div. 137).....474
 Globe, The (2 Blatchford, 427).....557
 Glover v. Kelsey (2 Paige, 418)..... 96
 Goddard v. Foster (17 Wallace, 123).....102

H

Hall v. Fisher (9 Barbour, 25).....472
 Hall v. Green (24 Eng. L. & E. 453).....346
 Harris v. Hardman (14 Howard, 334)....95-98
 Hartung v. The People (22 N. Y. 95)....374
 Hayward's Case (1 Sandford, S. C. 702)..221
 Hebe, The (2 Wm. Rob. 412).....684
 Hernandez v. Sun Mut. Ins. Co. (6 Blatchford, 317).....261
 Herman Ludwig (Vice Ad. Court of N. S. unrep.)..... 74
 Henderson's Distilled Spirits (14 Wallace, 57).....372
 Heroine, The (1 Benedict, 226).....667
 Holmes v. Jennison (14 Peters, 540)....206, 210
 Hope, The (Bee's R. 2).....111
 Hopkins's Case (S. D. of N. Y. unrep.).. 5
 Hunt v. Burrell (5 Johnson, 137).....467
 Humphrey's Case (2 Blatchford, 229)....576

I

Iasigi v. Brown (1 Curtis, C. C. 401).....265
 Iasigi v. Collector (1 Wallace, 375).....348
 Ins. Co. v. Adams (9 Peters, 603).....469
 Isaac Newton, The (4 Blatchford, 22)....101

J

Jacques v. Collins (2 Blatchford 23).....265
 Jackson v. Kent (7 Cowen, 63).....572
 Jasper v. Porter (2 McLean, 579).....175
 Jane, The (1 Dodson, 466).....672
 Johannes, The (10 Blatchford, 478).....162
 John Adams, The (1 Clifford, 404).....432
 John Fraser, The (21 Howard, 188).....531
 John Farron, The (14 Blatchford, 24)416-664
 John Jay, The (17 Howard, 402).....671
 Johnson v. Michelson (3 Campbell, 46)...389
 Johnson v. Rogers (15 N. B. R. 1)..... 44
 Johnson v. Reilly (13 Ga. 98).....217
 Judson's Case (3 Blatchford 89).....576
 Julia Blake (16 Blatchford, 472).....677

K

Knagg v. Goldsmith (Gilpin, 207).....392
 Kearon v. Pearson (7 H. and N. 386)....184
 King v. Mann (4 M. and S. 337).....346
 King v. Sheppard (3 Story, 349).....304-308
 Kingsbury's Case (106 Mass.).....221
 Kentucky v. Dennison (24 Howard, 66-101).....207-212-217

L

Lady Franklin, The (2 Lowell, 220).....532
 Leak v. Howell (Cro. Eliz. 533).....463
 Leland's Case (7 Abb. Pr. N. S. 64).....221
 Linda Flor, The (Swabey, 309).....622
 Lizzie, The (L. R. 2. A. and Ec. 250)....677
 Lottawanna, The (21 Wallace, 538) ..188, 243
556
 Louisiana, The (3 Wallace, 164).....162, 432
 Louw v. Davis (13 Johnson, 226)..... 41

M

McDonald, The (S. D. of N. Y. unrep.)..531
 McGilvray v. Capen (7 Gray, 525).....362
 Magee v. Moss (Gilpin, 531).....399
 Mailer v. Express Co. (61 N. Y. 316)....102
 M. M. Caleb, The (9 Benedict, 159)..... 48
 M. M. Caleb, The (10 Blatchford, 470)...101
 Mantosa v. Lond. Ins. Co. (6 Exch. R. 459).....253
 Maud Webster, The (8 Benedict, 547)....437
 Martin v. Walker (Abb. Adm. 581).....465
 Mendelssohn's Case (12 N. B. R. 533).... 5
 Monte Christo, The (E.D. of N.Y. unrep)243
179
 Morrisania, The (13 Blatchford, 512).....179
 Moses Taylor, The (4 Wallace, 411).....514
 Mumford v. Church (1 Johnson's Cases, 147).....572

N

Napoleon, The (Olcott, 215).....386
 Nathaniel Hooper, The (3 Sumner, 591). 77
 Nellie D., The (5 Blatchford, 245).....601
 Neptune, The (Gilpin, 89).....370
 Neptune, The (1 Haggard, 192)....561
 Nelson, The (1 Haggard, 176).....672
 New World, The (16 Howard, 469).....514
 Niagara, The (21 Howard, 7).....302-320
 Nina, The (Eng. L. R. 2 Ad. and Ec.)....389
 Norwich Co. v. Wright (13 Wallace, 104)15-194-504
253-314
 Notara v. Henderson (1 Aspinall, 378)....253-314
 Nugent v. Smith (Eng. L. R. 1 C.B. Div. 423).....309

O

Olivier, The (Lushington, 484).....676
 Oceanus, The (6 Benedict, 129).....507
 Onward, The (L. R. 4 A. and Ec. 57).....677
 Oriental, The (7 Moore's P. C. 398).....677

P

Parker v. Kelitt (1 L. Raymond, 658)....468
 Parsons v. Bedford (3 Peters, 483).....448
 Patch v. Marshall (1 Curtis, C. C. 452)...897
 Pacific M. S.S. Co. v. 10 Bales (3 Sawyer, 187)74
 Pauline, The (1 Bissell, 398).....105

Phillips v. The Blanche Page (7 Rep. 326).....449
 Peck's Case (3 Blatchford, 118).....571-576
 Pennsylvania, The (19 Wallace, 125).....647-653
 People *ex rel.* Connors v. Reilly (11 Hun 94).....221
 People *ex rel.* Lawrence v. Brady (56 N. Y. 182).....217-221
 Pride of the Ocean (7 Federal Reporter, 241).....620
 Priscilla, The (1 Aspinall, M.L.C. 469).....601

R

Ranston v. Etteridge (2 Chitty, 273).....346
 Rachel, The Sch'r v. The U.S. (6 Cranch. 329).....373
 Raymond v. Tyson (17 Howard 53).....363
 Rebecca Clyde, The (5 Benedict, 98).....74
 Reeside, The (2 Sumner, 571).....310
 Richardson v. Goddard (23 Howard, 28).....314
 Rio Grande, The (23 Wallace, 463).....473
 Rowena, The (Ware, 309).....392

S

Sailor Prince, The (1 Benedict, 466).....624
 Sandford v. Burrill (Anthon, N. P. 184).....572
 Shankweller v. Reading (4 McLean, 241).....175
 Shand, The (4 Federal Reporter, 925).....301
 Saragossa, The (1 Benedict, 551).....74
 State v. Buzine (4 Harrison, Del. 572).....216
 State v. Howell (Charlton, Ga., 20).....221
 Saxonia, The (1 Lushington, 410).....649
 Sea Nymph, The (1 Lushington, 28).....432
 Sedden v. Intap (6 Term Rep. 607).....41
 Seneca, The (18 Am. Jur. 486).....111-134
 Sheppard v. Taylor (5 Peters, 701).....90
 Snelder v. Croy (2 Johnson, 227).....41
 Smith v. Condry (1 Howard, 28).....503
 Simonds v. Hodgson (3 B. and Ad. 50).....672
 Scotia, The (1 Blatchford, 309).....650
 Scott v. Russell (Abbott's Adm. 258).....370
 Skolfield v. Potter (Davies, 2 Ware, 392).....457
 Solomon's Case (1 Abbott's Pr. N. S. 347).....221
 Storm-king, The (unreported).....474

T

Taylor v. Atlantic Mut. (87 N. Y. 275).....109
 Tartar, The (1 Haggard, 14).....672
 Traveller, The (6 Benedict, 280).....245
 Transp. Co. v. Downer (11 Wallace 134).....312, 320
 Triumph, The (2 Blatchford, 438).....557
 Thommassen v. Whitwell (9 Benedict 403, 458).....503
 Two Sisters, The (2 W. Rob. 144).....394
 Tucker v. Oxley (5 Cranch. 35).....56
 Tuskar, The (1 Sprague, 71).....370

U

Union, The (4 Blatchford, 90).....565
 U. S. Grant, The (7 Benedict, 337).....454
 United States v. Block 121 (3 Bissell, 205).....448
 United States v. Cousinery (7 Benedict, 252).....348

United States v. Four Cases (1 Benedict, 218).....377
 United States v. Jailor (2 Abb. U. S. 272).....470
 United States v. Jay Cooke (5 Amer. L. T. 166).....410
 United States v. Passmore (4 Dallas, 372).....374
 United States v. Locomotive (E. D. of N. Y. unrep.).....488
 United States v. Wagner (L. R. 2 Ch. 589).....279
 United States v. Quantity of Tobacco (5 Benedict, 134).....496
 United States v. Distillery (11 Blatchford, 262).....496
 United States v. Thirty-three barrels (1 Lowell, 239).....486

V

Vaughan and Telegraph, The (14 Wallace, 258).....365
 Vaughan v. 630 Casks (7 Benedict, 506).....238
 Vallid v. Sheriff (2 Mo. 26).....221
 Van Hook v. Pendleton (2 Blatchford, 94).....175
 Vandewater v. Mills (19 Howard, 90).....106
 Van Tine v. The Lake (2 Wallace Jr 52).....162
 Veltman v. Thompson (3 N. Y. 438).....189
 Virginia Rulon, The (13 Blatchford, 519).....154
 Vincennes, The (U. S. Dist. Ct. Me., 1851).....111
 Vogel's Case (9 Benedict, 498).....5
 Voorhees' Case (32 N. J. L. R. 149).....208-217

W

Walte v. Whitney (7 Cowen, 69).....573
 Washington Irving, The (Abb. Adm. 336).....432
 Wallis v. Murray (4 Cowen, 401).....280
 Warrior, The (Lushington, 476).....48
 Washburn's Case (4 Johnson's Ch. 106).....221
 Watt v. U. S. (15 Blatchford 29).....348
 Webb v. Pierce (1 Curt. 113).....457
 Westray v. U. S. (18 Wall. 322).....348
 Willings v. Blight (2 Pet. Adm. 290).....112-115
 Wild Ranger, The (1 Lush. 553).....503
 Williamson v. Barrett (18 Howard, 111).....667
 William and Emeline, The (Blatchford and Howland, 20).....680
 Winthrop v. Carlton, (12 Mass. 4).....686
 Whitteredge v. Dill (23 Howard, 453).....601
 Woodruff v. Comm. Mut. Ins. Co. (2 Hill-ton 230).....258

Y

Yeaton v. U. S. (5 Cranch. 281).....374
 York Co. v. Central R. R. (3 Wallace, 118).....175
 Yuba, The (4 Blatchford, 352).....684

Z

Zollverein, The (Swabey, 96).....649

UNITED STATES DISTRICT COURT REPORTS.

Southern District of New York.

JUNE, 1878.

IN THE MATTER OF VERMEULE.

CLERK'S FEES FOR SEARCHING FOR PETITIONS IN BANKRUPTCY.

The compensation to the Clerk of the Court for searching for petitions in bankruptcy is not expressly provided for in section 828 of the Revised Statutes of the United States.

A reasonable compensation for such service is fifteen cents for each name searched against.

CHOATE, J. This is an application to the Court to determine the amount of the fees to which the clerk is entitled for making and certifying a search for judgments and for petitions in bankruptcy.

The fees claimed by the clerk are for searching for judgments and decrees, fifteen cents for each name searched against, and for searching for petitions in bankruptcy ten cents a year for each name searched against for ten years, making one dollar for each name searched against. It is conceded that the clerk is entitled to fifteen cents for searching for judgments; and no objection is taken to fifteen cents for each name searched against for petitions in bankruptcy, but objection is made to

In the matter of Vermeule.

anything more than fifteen cents for each name searched against for petitions in bankruptcy.

The fees of the clerk so far as they are fixed by statute are governed by Rev. Stat., Title 13, Ch. 16, § 828, which contains the following :

“ For every search for any particular mortgage, judgment or other lien, fifteen cents.”

“ For searching the records of the court for judgments, decrees, or other instruments constituting a general lien on real estate and certifying the result of such search, fifteen cents for each person against whom such search is required to be made.”

The second of these provisions is a re-enactment of the Statute of 1853, Ch. 80, § 1, passed Feb. 26, 1853. The bankrupt law which was passed in 1867 contained no provision in relation to searches or fees for searches ; but under its provisions the filing of a petition in bankruptcy affects or may affect the title to real estate, and an examination or search for these petitions therefore becomes necessary before a title is passed. Such a petition seems not to come within the description contained in the Act of 1853 or the Revised Statutes, “ judgments, decrees or other instruments constituting a general lien on real estate.” At least, it is not claimed in this case that it does. The case is therefore a case not expressly provided for by the statute. The clerk cannot be called on to render this service without compensation, if the case is not within the existing provision of the statute. He must in such case be entitled to a reasonable compensation, having regard to the fees allowed for the services most nearly like this as now fixed by law. It is admitted by the clerk that the time and labor required for making this search are no greater than are required in making search for judgments and decrees, and for this service for the last twenty-five years the law of Con-

In the matter of Vermeule.

gress has allowed the fee of fifteen cents for each name searched against. No closer analogy or guide could be found than this statute affords for determining what is a reasonable fee for this new service required of the clerk.

It is suggested that by a statute of New York, passed in 1853, the county clerk is allowed fifteen cents a year for each name searched against for judgments, and five cents a year for each name searched against for other papers and records, and that this affords some guide to the determination of the reasonable fees to be allowed the clerk in a case not specially provided for by statute. These two statutes, nearly contemporaneous, proceed evidently upon a very different rate of compensation for similar services. What the difference is owing to is not obvious on the statutes themselves. It may be that the State statute fixed higher rates in view of a very much larger number of judgments and other instruments entered and filed in the County Clerk's office; but whatever may be the reason for this difference, I am bound to follow the clear indications of the Federal statutes as to the proper fee to be charged for such services in the clerk's office of a Federal Court.

The charge for searching for petitions in bankruptcy in excess of fifteen cents for each name searched against, disallowed.

For appellant, *Carlisle Norwood, jr.*

For the clerk, *pro se*, *George F. Betts.*

UNITED STATES DISTRICT COURT REPORTS.

Southern District of New York.

JUNE, 1878.

IN THE MATTER OF VERMEULE.

CLERK'S FEES FOR SEARCHING FOR PETITIONS IN BANKRUPTCY.

The compensation to the Clerk of the Court for searching for petitions in bankruptcy is not expressly provided for in section 828 of the Revised Statutes of the United States.

A reasonable compensation for such service is fifteen cents for each name searched against.

CHOATE, J. This is an application to the Court to determine the amount of the fees to which the clerk is entitled for making and certifying a search for judgments and for petitions in bankruptcy.

The fees claimed by the clerk are for searching for judgments and decrees, fifteen cents for each name searched against, and for searching for petitions in bankruptcy ten cents a year for each name searched against for ten years, making one dollar for each name searched against. It is conceded that the clerk is entitled to fifteen cents for searching for judgments; and no objection is taken to fifteen cents for each name searched against for petitions in bankruptcy, but objection is made to

John Sedgwick, Assignee, v. George B. Grinnell.

JUNE, 1878.

JOHN SEDGWICK, ASSIGNEE, vs. GEORGE B.
GRINNELL.

COSTS.—FEES ON COMMISSION TO TAKE TESTIMONY.

The practice of the court allows as a disbursement to a party who may be entitled to costs, what may have been properly paid by him for the execution of a foreign commission to take testimony. But disbursements must be reasonable and must have been necessarily incurred, and are not to be deemed to have been necessarily incurred unless they are reasonable for the service rendered.

If such a commission is issued to another State of the Union, addressed to a person other than one of the "commissioners of the Circuit Court," the compensation fixed by law for such services, when performed by a commissioner of the Circuit Court, fixes a standard which should control the discretion of the court as to the amount to be allowed for the fees on the execution of such commission.

If the commission issues to a foreign country, where no officers are provided by the law of the United States for the execution of such commission with definite fixed fees, the amount allowed by law here will be taken to be a sufficient compensation for the same service abroad, unless it be shown that the customary charge in such foreign country is greater. If that is shown, it must be held that the party taking out the commission necessarily pays such larger sum.

CHOATE, J. The defendant having a final decree for his costs and disbursements, claims to be allowed as a disbursement the payment of \$75 paid by him for the execution of a commission to take testimony at Louisville, Kentucky, and \$394.78 for the execution of a commission to take testimony in London, England. The commissions were issued by consent to the parties named therein as commissioners. The plaintiff's counsel insists that the persons to whom the commissions were

John Sedgwick, Assignee, v. George B. Grinnell.

issued are "commissioners" within the meaning of Rev. Stat. Title 13, Chap. 16, which fixes the fees of attorneys, clerks, marshals, commissioners, witnesses, jurors, and printers. In this I think the counsel is in error. That chapter, as clearly appears upon a view of all its provisions, refers to "commissioners of the Circuit Court," appointed under section 627 of the Revised Statutes. The clerk held, however, that the rate of fees to be allowed was governed by the chapter of the Revised Statutes above referred to, which fixes the fees to be paid to "commissioners" at twenty cents a folio "for taking and certifying depositions to file," and he allowed as a disbursement on each of the depositions \$25, which was agreed upon by the parties as a proper amount of the fees if determined by that statute. The practice of the court allows as a disbursement what may have been properly paid by the party entitled to costs for the execution of a foreign commission. Disbursements, however, must in all cases be reasonable in amount for the service rendered and must have been necessarily incurred. The exorbitant fees exacted in some parts of the world for the execution of foreign commissions have long been a grievance to attorneys and litigants, and these charges should in all cases where they are chargeable as part of the costs be reduced to what is a reasonable sum for the service rendered. If any amount, however excessive, which the party taking out the commission chooses to pay or is compelled to pay by the commissioner selected, can be charged on the other party, no check is kept on these exactions. The charges are not to be deemed necessarily incurred, except so far as they are reasonable in amount for the service rendered. On the question what will be a reasonable amount the fees fixed by statute for the like service afford a proper standard, with such variation as may be required to conform the charges to those customarily allowed for similar services in the country

John Sedgwick, Assignee, v. George B. Grinnell.

where the commission is executed, provided such customary charges are not unreasonable.

If the commission is issued to another State in this Union, addressed to a person other than one of the "commissioners of the Circuit Court," who are officers especially appointed for the purpose of attending to such duties, the compensation fixed by law for such "commissioner of the Circuit Court" for the same service affords a definite standard, which should control the discretion of the court in determining the reasonableness of the charge in the particular case. If the commission issues to a foreign country where no officers are provided by the law of the United States for the execution of such commission at any definite fixed rates, the amount allowed by law here will be taken to be a sufficient compensation for the same service abroad, unless it be shown that the customary charge in such foreign country for the like service is greater, and if that is shown it must be held that the party taking out the commission necessarily pays such larger sum.

In this case, therefore, the clerk properly taxed these two items on the proofs before him, that of the Kentucky commission because the analogy of the statute fixes the standard of charge, that of the English commission, because there was no proof that the service is ordinarily more liberally compensated in England.

The fact that similar charges have been often included in bills of costs taxed, is immaterial, since no case is referred to where the question of the right to them has been raised. If a party to a suit is under the necessity of examining witnesses abroad, it may be a hardship or a misfortune that he is compelled to pay more than a fair compensation for the execution of the commission, but there is no equitable principle by which he can throw this hardship or misfortune on the other party merely because he happens to prevail in his suit. The con-

The United States v. A Quantity of Manufactured Tobacco.

sent to the issuing of the commission cannot be deemed a consent to pay as costs any amount of fees that the other party may pay however unreasonable. In this case it does not appear whether the defendant paid these charges voluntarily or whether they were extorted from him by the commissioners by the withholding of the commissions till the fees were paid. But I see no difference in principle in the two cases. The matter is very much in the control of attorneys, who may in arranging their stipulations for the issuing of commission make proper provision for the payment of these expenses by agreement. The practice of allowing extortionate charges like those in the present case as costs would be giving the encouragement of the courts to the extortions complained of.

Taxation of costs confirmed, with leave to the defendant to apply for a retaxation as to the English commission upon further evidence.

For plaintiff, *Thomas M. North.*

For defendant, *Mr. Devine.*

JUNE, 1878.

THE UNITED STATES vs. A QUANTITY OF MANUFACTURED TOBACCO AT 221 WASHINGTON STREET.

SURETY.—NOTICE OF DECREE.—APPROVAL OF SECURITY ON APPEAL.

In an action against property for violation of the Internal Revenue Laws, L. appeared as claimant of the property seized and gave a stipulation with O. as surety in which L. was named as proctor of the claimant. The decree

The United States v. A Quantity of Manufactured Tobacco.

in the District Court being in favor of the United States, L. took the case by writ of error to the Circuit Court, and gave his own personal bond on the writ of error, which was approved by the judge in the usual form. The decree was affirmed by the Circuit Court and a writ of error was taken to the Supreme Court, on which L. again gave his personal bond without surety by consent of the district attorney; and this bond was also approved by the judge in the usual form. The Supreme Court affirmed that decree and a final decree was entered, and an order was made that notice be given to the sureties on the first stipulation to perform their stipulation or show cause why execution should not issue against them. Other proctors had during the progress of the cause been substituted for S. and this notice was served on such other proctors, who had agreed to notify O. of the entry of any decree. They failed to do so, however, and O. had in fact no notice, and an order was made by default that execution issue and it was issued accordingly. O. thereupon applied to open the default and to be allowed to come in and show cause and that the execution be set aside, claiming that the taking of the bonds on the appeals without surety and with the approval of the district attorney had discharged him, and that L. had given to the plaintiff \$75,000 in government bonds as further security, which bonds it was alleged had been stolen :

Held, That the default against the surety might be opened if he had shown any meritorious defence, but that the facts put forward by him furnished no defence against his liability on the stipulation.

CHOATE, J. This was an information for violation of the internal revenue laws. The claimant, C. N. Lilienthal, gave a stipulation for value with one Olwell as one of his securities in the sum of \$104,000. The stipulation was in the usual form and named Stephen D. Stephens, jr., as proctor for the claimants, to whom notice of the order or decree of this court or the appellate court was to be given. The decree in this court being for the plaintiff, the claimant took the case by writ of error to the Circuit Court and gave his own personal bond on the writ of error, which was approved by the judge in the usual form, he being then responsible for the amount. The decree in the Circuit Court was for the plaintiff and the claimant took the case on writ of error to the Supreme Court

The United States v. A Quantity of Manufactured Tobacco.

and gave his own personal bond on the writ of error without surety. On this bond the District Attorney made the following endorsement: "I agree to accept the foregoing bond of the claimant without sureties as a sufficient bond to secure costs in the Supreme Court on a writ of error to the Circuit Court in this action and as establishing the present sufficiency of the claimant and his responsibility for the amount of the value of the property condemned secured by bond in the District Court, but not to affect the obligation of such bond on the claimant and sureties thereon." And the attorneys for the claimant wrote under this endorsement: "The foregoing bond is understood by the obligor to be given on the terms and with the effect mentioned in the foregoing acceptance of the United States Attorney." This bond was also approved by the judge in the usual form.

The Supreme Court affirmed the decree below and a final decree was entered and an order was made that notice be given to the stipulators in the stipulation given in this court to perform their stipulation or to show cause why execution should not issue against them. The notice was given, not to Stephens, who is named as proctor for the claimants in the stipulation, but to other proctors who had been substituted for him as proctors for the claimants and had carried on the defence of the subsequent proceedings.

It appears by the affidavit of Olwell that he had made an arrangement with these substituted proctors to be notified by them whenever they received notice of the entry of the decree, but they failed to give him notice and he had no notice in fact, and the substituted attorneys of the claimant did not attend upon the return of the order to show cause.

Olwell, one of the sureties in the stipulation, now moves to open the default and to be allowed to come in and show cause why execution should not issue against him, and he also

moves that the execution be set aside. If the surety showed any meritorious grounds on which if the default were opened he could be relieved, it would be proper to grant the motion to open the default, as it appears that he had no notice in fact. There was no irregularity in serving the notice on the substituted proctors for claimants. They were the proper persons to receive the notice. The surety so understood it himself, as is shown by the arrangement made with them for notice from them to him.

The only grounds on which upon the merits the surety claims to be relieved are : *first*, that the plaintiff by taking the bonds of the claimant without sureties on the appeals discharged the sureties in the stipulation ; *secondly*, that the qualified consent or acceptance endorsed by the District Attorney on the bond given on error to the Circuit Court discharged the sureties in the stipulation ; and *thirdly*, that the giving by the claimant to the plaintiff of \$75,000 in government bonds as further security after the execution of the stipulation, which further security it is alleged was exacted by the plaintiffs as a condition to their giving their consent to the claimant's continuing his business, discharged the sureties in the stipulation.

As to the first and second grounds it is clear that the bonds taken complied with the statute, which provides that " every justice or judge signing a citation or any writ of error, shall, except, etc., take good and sufficient security." Rev. Stat. §1000. The question of the sufficiency of the security must be determined by the judge. (*Brockett v. Brockett*, 2 How. 258.) There is no statute requiring one or more sureties if the bond offered is approved as sufficient. And if the bond is approved as sufficient it is immaterial that the District Attorney may have assented to it, or may have given a qualified or restricted assent.

The United States v. A Quantity of Manufactured Tobacco.

The position taken by Olwell is that by taking bonds without sureties and bonds thus assented to by the District Attorney without his (Olwell's) assent, the terms of the undertaking in which he was bound as surety were altered, or at least that there was an implied covenant on the part of the United States with him that they would not take any proceedings with the principal which would increase the risks of the sureties or affect their remedy against the principal; that when Olwell entered into the stipulation for value it contemplated that he must pay when the District Court rendered judgment of condemnation, or when the Appellate Court so ordered, if any appeal intervened;—that the appeal contemplated was the usual appeal with the usual security to stay the judgment, if there should be a stay, as provided for under existing laws; that it contemplated the giving of bonds on appeal with sufficient sureties, whose obligations would enure to the benefit of the sureties in the stipulation given below as between them and the principal.

If the petitioner were entirely correct in his view of the rights of the surety as to the implied covenant that the bond on appeal should be a proper bond according to existing law, it is entirely clear that the appeal was in the usual form and the security taken on appeal was such as existing laws provided for. It is not necessary therefore to consider whether the mere neglect of the government to enforce the decree below pending the appeals would have discharged the surety if it had appeared that one of the bonds given on appeal had been defective and such as would not operate as a supersedeas.

As to the alleged deposit of bonds, if it was made and the bonds were afterwards stolen, as the affidavits tend to show, it is not perceived that the deposit or the loss of the bonds can

In the Matter of the Petition of John G. Wright *et al.*

have had any effect upon the obligation of the sureties in this stipulation.

Motion denied.

For petitioner, *D. McMahon.*

For the U. S., Asst. Dist. Atty. *Hill.*

JUNE, 1878.

IN THE MATTER OF THE PETITION OF JOHN G.
WRIGHT ET AL.

LIMITATION OF LIABILITY OF SHIP-OWNERS.—VESSEL REPAIRED AFTER
COLLISION.—FREIGHT.—SAILING ON SHARES.

A collision occurred between two schooners, the S. and the A. T. on May 6, 1878. On the 11th of June, 1878, the owners of the S. filed a libel against the A. T. to recover their damages. The A. T. had been in the meantime repaired. On the 14th of June her owners filed a petition to limit their liability. A reference was had to fix her value, and the commissioner reported that her value after the collision was \$500, and that the interest of the owners in her pending freight was \$139.25, and the owners of the S. excepted to the report :

Held, That the value, to which the liability of the owners of the A. T. would be limited, was the value of the vessel after the collision and before she was repaired ; that, as the vessel was sailed on shares by a master who was not an owner, the interest of the owners in the freight was one-half of it after deducting port charges, which the commissioner had reported ;

That the exceptions must be overruled.

CHOATE, J. The petitioners are the owners of the schooner Adeline Townsend. June 11, 1878, the schooner was attached and a libel brought by the owners of cargo of the

In the Matter of the Petition of John G. Wright *et al.*

schooner Sophia Wilson, for damage sustained in consequence of a collision between that vessel and the Adeline Townsend, alleged to have been caused by the fault of the Adeline Townsend. June 14, 1878, the petitioners filed their petition, to obtain the benefit of the Act of 1851, limiting the liability of ship owners. (Rev. Stat. § 4283, et seq.)

The collision happened on the 6th of May, 1878. The Townsend was badly injured, and afterwards and before she was so attached she was repaired by the petitioners.

A reference was ordered to ascertain and report the value of the Townsend after the collision, and the interest of her owners in her pending freight. The commissioner has reported that the value of the vessel after the collision was \$500, and the interest of the owners in her pending freight was \$139.25. To this report the libellants have excepted as to the value of the vessel, claiming that the Act, limiting the liability of the owners, limits their personal liability only, and does not limit or impair the remedy which parties may have against the vessel; that therefore, if the owners repair after the collision, the lien for the damages still attaches to the vessel; and that they are entitled to have her valued as she is at the time of the attachment.

It is well settled that the value, which is the measure of the owners' liability, is the value of the vessel immediately after the collision. (*Norwich Co. v. Wright*, 13 Wall. 104.) Whenever, therefore, under the statute and the rules made for carrying it into effect, the owners apply in proper form to have this limit of their liability determined, it must be fixed by the measure of the value of the vessel just after the collision. When this value is so determined and the amount secured in due form or paid into court, all pending actions whether *in personam* or *in rem* are to cease and be stayed. This claim

In the Matter of the Petition of John G. Wright *et al.*

of the libellants has no support either in the statute, the rules or the decisions under them.

There is also no equity in their claim. The additional value, which the owners have put upon the vessel by repairing her, constituted no part of her at the time the damage was sustained. To allow this claim would seriously embarrass owners of vessels against which a claim for damage might be made. They could not safely repair till a libel was brought, and yet they could not compel the bringing of a libel. It is obvious that this would seriously impair the value of their property and prevent the use of it. But clearly the Act fixes a liability, whether the injured party seeks to enforce it *in personam* or *in rem*, measured by the value at a time certain and not a shifting and moveable value.

The libellants also except to the report of the commissioner as to the freight. The vessel was sailed by the master, who was not one of the owners, on half shares. The interest of the owners in the freight was one-half of the freight after deducting port charges, and so the commissioner has found.

Report confirmed.

For petitioner, *E. L. Owen.*

For libellants, *Coudert Bros.*

The Steamer City of New Bedford.

JUNE, 1878.

THE STEAMER CITY OF NEW BEDFORD.

COLLISION ON THE SOUND.—STEAMER AND SCHOONER.—LOOKOUT.

A schooner bound east and a steamer bound west came in collision in Long Island Sound in the night. Both vessels had proper lights set. The schooner averred that she was heading east half north; that the steamer was seen ahead a little on her port bow; that the schooner was kept on her course, and the steamer changed her course to the southward across the schooner's bows, and thus caused the collision. The steamer averred that she was heading due west, and that the schooner was seen ahead a little on the steamer's starboard bow, and that the schooner changed her course to the southward and ran into the steamer:

Held, That, on the evidence, the story averred on behalf of the schooner was correct, and that, she having kept her course, it was the duty of the steamer to have avoided her, and that the steamer, having failed to do this, was liable for the collision;

That, although the schooner had no lookout except her master, who was on her quarter-deck, yet, as the steamer was seasonably seen and kept in view and the schooner was kept on her course, there was no fault in reference to the lookout, which either charged the schooner with the collision or relieved the steamer from her responsibility for it.

CHOATE, J. This is a libel by Driscoll Brothers and others, the owners of the schooner J. W. Scott, against the steamer City of New Bedford, for damages caused by a collision between said vessels about one o'clock in the morning of the 24th of November, 1876, in Long Island Sound. The schooner was bound from New York for St. John, New Brunswick, with a general cargo of merchandise. The steamer was bound on her regular trip from New Bedford for New York. The collision took place about five miles northerly from Horton's Point Light. The night was dark, but lights could be seen a long distance. The libel avers

The Steamer City of New Bedford.

that the schooner was heading east half north; that the steamer was seen at a long distance nearly ahead, but a little on the schooner's port bow; that the steamer did not make any change in her course till within about one hundred and fifty feet of the schooner, when she suddenly changed her course, sheering suddenly to port, directly across the bows of the schooner, too late to pass her, and striking her side against the bowsprit of the schooner; that, from the time when the steamer was first seen till the collision, the schooner headed on her course east half north, and the steamer was heading about west by south until she changed her course to cross the schooner's bows; that the collision was caused by the negligence of the steamer in not keeping a proper lookout, in not avoiding the schooner, as she might have done by sheering, or slowing and stopping, and in unnecessarily crossing the bows of the schooner.

The answer avers that the steamer's course was due west; that those in charge of her made a green light about one point on her starboard bow, and a few minutes afterwards a red light about one point on her port bow; that she kept her course due west for a few minutes longer, when the vessel on her starboard bow suddenly showed both her green and red lights, and appeared to be bearing directly down upon the steamer; that the steamer's wheel was immediately thrown hard to starboard, and she was slowed to half speed, and at once began to fall off, and when she had fallen off about a point the vessel on her port bow also kept off sufficiently to keep out of her way, and the vessel on her starboard bow (the J. W. Scott) ran into her, the bowsprit striking on the starboard side on the first stateroom and breaking off, and the schooner striking the steamer again about amidships; that the collision was caused wholly by the carelessness of the schooner in changing her course instead of keeping her

The Steamer City of New Bedford.

course, and in not having a proper lookout and in not being properly manned and equipped.

The wind is stated in the libel to have been northwest by west, and in the answer about north northwest.

The witnesses on the schooner—her master who was on the lookout, and the man at the wheel—testify, that they saw the bright light of the steamer about a mile or more away; that they kept on their course east half north; that when they first saw the steamer's light it bore a little on their port bow; that as she neared them it drew a little further open; that they then saw the green light of the steamer, and soon after the steamer swung to the southward across their bows, but before she could get across their course the vessels came together.

The witnesses on the steamer testify that she was running due west, when she made the green light of the schooner about one point on her starboard bow, and soon after a red light on her port bow; that as the green light approached, the vessel bearing it suddenly showed both her lights, bearing then about two points on her starboard bow; that the wheel of the steamer was immediately thrown hard a-starboard, and she was slowed, and the schooner struck her as they came together, the courses of the vessels being nearly at a right angle.

It is obvious that the two accounts cannot be in any way reconciled. If the steamer kept on her course due west and made the green light of the schooner on her starboard bow, and while she was so keeping on her course the schooner showed her both lights, the schooner must have changed her course. On the other hand, if the schooner kept her course east half north, and made the steamer's green light on her port bow, the steamer must have been heading considerably more to the southward than she claims to have been.

The Steamer City of New Bedford.

The schooner was bound to keep her course, and the decisive question in the case is whether she did so. Upon a careful examination of all the testimony, I am satisfied that the schooner's account of the collision is correct, and that given by the steamer's witnesses is a mistake.

The witnesses on both vessels agree that they came together at about a right angle. Now to bring them into this position at the instant of collision, if the steamer was, as she says, heading due west before she starboarded, and then fell off a point and a half, as she says, the schooner must have headed at the time of the collision six points to the southward of an east course. With the wind as it was, somewhere from west northwest, as the libellant's witnesses say, to northwest by north, as the steamer's witnesses say, and they agree that it was a fresh breeze, the wind would very probably have been on the schooner's starboard quarter before the vessels came together, and in that case she would have jibed over before she struck. It is testified by the schooner's witnesses, and not contradicted by the steamer's witnesses, that, after she struck, her head was hauled round by the collision to the southward, and she then jibed over.

But without relying too much on this circumstance, which depends, perhaps, upon greater exactness as to the direction of the wind and the course of the schooner than can be with certainty arrived at, it is difficult to understand why the schooner should have made a course so far to the south as it is necessary to put her on to find the steamer's account substantially true.

The claimants called two witnesses from the schooner Merwin, and rely upon their testimony as corroborating that of the steamer's witnesses. Their testimony, however, tends strongly to confirm the case of the schooner, that she was not before the collision heading at all to the southward. If they

The Steamer City of New Bedford.

are not mistaken in the identity of the vessel that came into collision with the steamer, she passed the Merwin on the starboard side, being a faster sailer, and, having got by, she luffed across the Merwin's bows, and when she got a very short distance to windward of the Merwin, stood on her course about east until the collision, which took place, as they say, about a quarter of a mile from them on their port bow.

This evidence is relied on by the steamer as accounting for the steamer's first seeing the green light of the schooner, which she would show when luffing up across the bows of the Merwin, and then both her lights, when afterwards she changed her course. But the testimony does not bear out the theory of the case, which is essential to the corroboration of the account given by the steamer, which requires the schooner to have been standing at least on an east southeast course when the steamer starboarded, and still further to the southward when she struck. This testimony does not show that, when the schooner stood on her course to the eastward after crossing the bows of the Merwin, she was so near to the steamer as to make it improper for her to stand to the eastward, but rather the contrary; and although the Merwin had made the steamer's light before the other schooner passed her, the Scott may upon the testimony of the Merwin's witnesses have been three-quarters of a mile or more from the steamer when she headed east on her course again, and if she then made the steamer's light and kept on her course, this evidence is all consistent with that of the libellants' witnesses. And if, as the witnesses from the Merwin say, they kept the Scott in view till the collision, seeing her binnacle light, they could hardly have failed to observe it if she had headed southeast, thus crossing the bows of the Merwin again. Indeed, no conceivable motive is suggested for the schooner's

The Steamer City of New Bedford.

taking a south-easterly course, especially just after luffing up to get further to windward. It is not shown that anything was in her way. She cannot have sheered to the south to avoid the steamer. Such a movement was not called for by the account which either party gives of the relative positions of the two vessels. Her proper course was easterly. The wind was fair. To head south of east would be going out of her proper course. On the other hand, although the proper course of the steamer was due west, yet she was bound to vary from that course as should be found necessary to avoid sailing vessels, of which her witnesses admit there were very many in that part of the Sound at that time. She was going through them at full speed, twelve miles an hour. That she should be off of her course for this reason is no ways improbable; and it is much more probable that the witnesses on her deck should be mistaken as to the precise course she was on when she made the two lights of the schooner, and that they should fail in remembering a departure more or less from that course to the southward for the purpose of avoiding some vessel, than that the schooner without any reason should have made a south-easterly course, and that the witnesses from her and from the Merwin should all be mistaken. There is really only one witness from the steamer who testifies that the vessel whose green light was seen on the starboard bow was the same vessel whose two lights were afterwards seen, and which ran into the steamer; and he was looking out for the lights of other vessels in sight. It is not very improbable, as claimed by the libellant's counsel, that it was not the same vessel. The lookout on the steamer having reported the green light on the starboard bow, paid no further attention to her till both lights appeared close by. But if the vessel was the same, and the green light of the schooner was seen as she luffed across the bows of the Merwin, the evidence is satis-

The Steamer City of New Bedford.

factory that her movements were not properly attended to by the steamer; that she again stood east at a perfectly safe distance from the steamer, and that the steamer afterwards took a more southerly course across her bows, thus bringing on the collision.

The steamer was in fault in not keeping a good lookout, and in not avoiding the schooner, as she was bound to do.

The counsel for the claimants insists that the schooner was at fault in having no lookout forward, the master having acted as lookout, and being stationed on the quarter-deck. If this management had led to the schooner's not observing the steamer, and from not observing her she had changed her course, and thus brought on the collision, the collision might be attributed to this cause; but as she saw the steamer seasonably and kept her in view, and kept on her course, as she was bound to do, it is impossible to attribute to the schooner any fault in respect to the lookout, which either charges her with the collision or relieves the steamer from the responsibility for it.

The claimant's counsel also insists that the schooner had an incompetent wheelsman, and attributes the erratic course which is charged upon the schooner to his wild steering; but the evidence shows that he had sufficient experience to hold the schooner to her course, and there is no ground in the testimony for this theory.

There must be a decree for the libellants, with a reference to compute the damages.

For libellants, *R. D. Benedict.*

For claimants, *H. J. Scudder.*

JUNE, 1878.

THE BARK VERONICA MADRE.

NAVE OF CARGO BY MASTER. --CHARTER.

A bark sailed from Philadelphia with a cargo of corn, bound to Cork for orders. She met with heavy weather and put into Bermuda in distress, where, on the recommendation of surveyors, part of the cargo was discharged, being found to be heating, wet and damaged, and the vessel was repaired. While the cargo was being reloaded it was found to be again heating, and, a survey being called, the surveyors recommended that part of it be again discharged and cooled. While this was being done the master went to Philadelphia and informed the underwriters and the shipper of the corn of the situation of affairs. Neither the underwriters nor the shipper gave him any instructions. The latter told him they had sold the corn to a London house whose name they gave to the interpreter who accompanied him, he being an Italian and speaking no English. The master sent no information to the London house, but returned to Bermuda. After his return to Bermuda another survey was held, which reported the corn, as well that which was discharged as some 8,500 bushels still on board, as being unfit to proceed on the voyage to Europe, and therefore recommended its sale. Previous to the sale the master made an agreement with one Gray, by which if Gray bought 10,000 bushels of the corn the master was to carry it to New York, free of freight, but was to have half the profit arising on its sale in New York. The cargo was sold and Gray bought 11,000 bushels, including the 8,500 bushels which had never been discharged from the vessel, and the master carried it in the bark to New York. The master acted in what he did with the knowledge and concurrence of the agent of the underwriters. The corn which was carried to New York arrived there in good shipping condition for Europe. It was sold there for four times what Gray paid for it, but for about 6 cents a bushel less than sound corn, and was immediately shipped to Europe by the purchaser. The London house, which had purchased the cargo from the shipper, filed a libel against the vessel for breach of the charter party under which the cargo had been shipped, in that the vessel had not proceeded to Cork for orders with the cargo. The owners of the vessel set up as a defence that the voyage had been broken up by perils of the sea, and the condition of the cargo :

The Bark Veronica Madre.

Held, That the agreement made by the master with Gray was one which should subject his acts and motives to the closest scrutiny and throw upon him the burden of showing that it was made in entire good faith ;
That the facts attending the condition and sale of the cargo in New York were not sufficient to overthrow the evidence that, when it was sold in Bermuda, it was not in a condition to be carried forward to Europe ;
That the master was not bound under the circumstances of the case to have communicated with the owners of the cargo before selling ;
That he was not authorized to bring the cargo to New York for account of its owners ;
That the sale of the cargo by the master was justified under the circumstances, and that the libel must be dismissed.

CHOATE, J. This is a libel filed by John Walker and others, owners of the cargo of the Italian bark Veronica Madre, for damages occasioned by breach of charter party. On the 24th of September, 1877, in London, the bark, which was then at Naples, was chartered to the libellants to proceed to Philadelphia, and thence with a full cargo of wheat or corn, for a voyage to Cork or Falmouth, for orders. The bark arrived at Philadelphia and took on board her cargo, about 29,000 bushels of Indian corn, and on the 28th day of December, 1877, set sail on her voyage to Cork, for orders, according to the charter party. The breach of the charter party relied on by the libellants is, that the bark did not proceed on her voyage to Cork or Falmouth for orders, and that the master has failed and refused to deliver the cargo to the libellants and has converted the same to his own use. The defence set up by the master, in his answer on behalf of the owners of the bark, is, that his bark being disabled by the perils of the sea, on the voyage, he put into the port of St. Georges, Bermuda, in distress, and there his cargo was sold from necessity, being wholly unfit to be carried on the voyage, and in a decaying condition.

The testimony shows that while the bark was proceeding on her voyage, on the 3rd or 4th of January, 1878, she

The Bark Veronica Madre.

met with gales and heavy seas, in consequence of which her cargo shifted, she was thrown on her beam ends, her stanchions were started, and her pumps choked with corn. After throwing over some spare sails and other things belonging to the bark, and a part of the corn, and throwing the corn over from the port to the starboard side, the master found it impossible to right the vessel, or to make the pumps work, so as to keep her clear of water. And the vessel making some water, and the cargo being wet, the master, after taking the advice of his crew, concluded to put into Bermuda, then about three hundred miles distant, and the nearest port he could make, with the wind then blowing and his vessel listed over. He arrived at Bermuda on the 9th of January, and on the 11th of January a survey was ordered by the Italian vice consul, to be made by three competent persons, under whose advice the cargo was partly discharged, in order that the vessel might be repaired. On the 19th of January, another survey of two competent persons was called to examine the cargo. They visited the vessel and the warehouse in which the part of the cargo that had been discharged was stored, at various times between the 19th and the 29th of January, and reported that much of the corn in the vessel on both sides was damaged, evidently by sea-water, that it was black and decaying, and much of the corn on the floor of the vessel amidships was also heated. They recommended that every precaution be taken to separate the decaying from the heated corn and both from the uninjured, during the discharge of the cargo; and they also reported that every precaution was being taken in the warehouse to separate the heated from the uninjured corn, and they finally recommended that the decaying corn, estimated at 4,000 bushels, be immediately sold at auction, and that the heated corn be

The Bark Veronica Madre.

properly aired and handled to expedite its cooling, and that what remained in the vessel be relanded.

The evidence shows that the recommendations of the surveyors were faithfully carried out. So far as could be done, the decaying corn was separated from that which appeared to be sound, and such appliances were availed of as were practicable in the port to cool and preserve that part of the cargo which was thought capable of being saved and re-shipped. And, the vessel having been repaired and the corn that was left being apparently cooled and fit to be reshipped, the master commenced reloading the vessel. When the corn had been nearly all reloaded, there came on rainy weather and the hatches had to be closed for three days. On removing the hatches on the fourth day, the corn in the vessel was found to be very hot and steaming. Thereupon a survey was called and the same surveyors, who had examined the cargo before, reported on the 20th of February that the greater part of the cargo had been shipped and that they found it in a very heated condition, fermenting and smoking, while that which remained in the warehouse was in apparently good condition; and they recommended that the cargo be immediately unloaded and cooled with the view of saving it for the interest of whom it may concern.

On the same day, Feb. 20, another survey was made by the resident agent of United States underwriters and by one Ellis, who is described as the "special agent of New York," and who is shown by other evidence to be the agent of New York underwriters. They reported that they found the corn to be in a very heated condition, undergoing fermentation, and they advised that the interest of those concerned would be consulted by its reshipment to the United States as speedily as possible, as the market in Bermuda was already glutted with a similar article.

The Bark Veronica Madre.

Immediately after this the master came to New York by steamer to consult the shippers of the cargo and the underwriters, leaving directions for the discharge of the cargo into the warehouse during his absence. He went to Philadelphia, and with an interpreter called on the firm of Waln & Co., who shipped the corn. The master is an Italian, and understands very little English. The president of the insurance company that had insured the cargo refused to give any instructions about the matter, stating that they were liable only for a total loss. The shippers at Philadelphia told him that they had nothing to do with the corn, that it was sold to a London house, and they gave the name of the libellants as the owners. This was understood by the interpreter, but seems not to have been understood by the master. They told him that they would look up their telegraphic code, and if they could find a short way of telegraphing, they would telegraph the libellants. Not finding any such, they told him that he might telegraph, which, however, he did not do. On the 27th of February, he wrote a letter to Waln & Co., giving a full and truthful account of what had happened up to the time he left Bermuda, and he sent with it copies of one or more of the surveys that had been taken. Waln & Co. were in constant communication with the libellants, and acted for them in the shipment of this cargo. They had received notice before the master's arrival that the vessel had put into Bermuda in distress ; and within a few days after receiving this information, Waln & Co. wrote to the libellants at London, giving them the same information, and the libellants replied, but gave no special instructions as to the matter. The master then returned by steamer to Bermuda, having been absent from there fourteen days or less. The discharging of the cargo was still going on when he arrived.

On the 5th of March, another survey was appointed by the Italian vice-consul. The surveyors were the American

The Bark Veronica Madre.

consul, and the special agent of New York underwriters, Mr. Ellis, and they reported that about one-third of the cargo was still in the vessel, that this portion they found extremely hot, sweating very badly, and very musty. As to the other portions of the cargo spread out in the stores they reported that notwithstanding the stores were very large and thoroughly ventilated, the corn was in a similar condition to that which was in the hold of the vessel; that superficially the corn was comparatively cool, but a very few inches below the surface it was extremely hot, sweating and musty; that when pressed by the hand, the grains became adhesive one to the other, and that it was very hot and clammy; that this was the prevailing condition of the entire lot. They added: "We are therefore decidedly of opinion that this cargo is not by any means in a fit condition to be reshipped for Europe, and we do not believe that it could be rendered in a fit condition for such reshipment." They also say that the stores in which it was spread were not sufficiently large to admit of the entire cargo being spread and cooled; and they recommended that portions be sold from the stores at judicious intervals of time to furnish space for that which was then excessively hot on board the vessel, and that, after that portion had been discharged and spread for cooling, it also should be sold for benefit of all concerned, and then concluded their report as follows: "We cannot express too emphatically our opinion of the decided unfitness of the cargo for reshipment for Europe."

About 3,000 bushels more were afterwards discharged from the vessel, leaving still in her about 8,500 bushels. The sales of the corn at auction under the recommendation of the report of this survey commenced on the 9th of March, on which day 1240 bushels were sold at prices varying from 17 cents to 23 cents per bushel. On the 14th of March 2000 bushels were sold, on the 20th of March 1100

The Bark Veronica Madre.

bushels, and on the 28th of March the rest of the cargo, including what remained on the vessel, in all about 17,000 bushels. Of the corn so sold, one Gray bought 11,000 bushels at 12½ cents a bushel. It included what remained in the vessel.

Besides the evidence of these surveys there was evidence of several witnesses who saw the corn in Bermuda, both that in the vessel and that in store, which strongly corroborates the statements of the surveyors, that the corn was very much heated, discolored, undergoing fermentation, and that it was not in a fit condition to be shipped on a voyage to Europe, and that the master did all that could be done down to the time of the reloading of the cargo and after its discharge a second time, to cool and save it. It also appeared that the sales were extensively advertised and numerous attended. Much of the corn was bought in small lots, and one of the purchasers was examined, by whom it appeared that his pigs, fowls and horses refused to eat the corn.

Thus far the evidence is entirely satisfactory that the cargo was in such a condition that it could not be carried forward on the voyage with safety, and that, if carried forward, it would in all probability become worthless; and as to the bulk of the cargo, that it could not, so far as could be foreseen by the master at the time, be made fit by the use of any means at hand to be carried forward; that it was in fact in a state of fermentation and decay.

But the libellants rely especially on the evidence of the condition of a part of the corn, after its arrival in New York, in the bark, as showing that the cargo was not in so bad a condition as represented in the surveys, and by the Bermuda witnesses, and that the sale was not necessary, nor made in good faith. The bark arrived at New York about the 20th of April. She had on board about 11,000 bushels of the corn shipped by Gray. The account which the master and the wit-

The Bark Veronica Madre.

nesses for the claimants give of the matter, is as follows : After it was determined to sell the cargo, the master inquired for ballast and found that it would cost him about \$400 to get ballast for his vessel. It was then suggested by Mr. Ellis, with whom he consulted on the subject, that Mr. Gray might be induced to buy a part of the cargo, and that it could be taken to New York as ballast and the bark might get some freight for carrying it. Gray wrote the master a letter, asking on what terms he would take a part of the corn to New York, if he should buy it. This led to the making of an agreement in writing between the master and Gray, under the advice of Ellis and others whom the master consulted. The agreement is dated the 19th of March, and is to the effect that if Gray should buy 10,000 bushels or more of the corn at a price not to exceed 12 cents a bushel, it should be carried in the bark to New York, "there to be sold to the best advantage, and on the following conditions," the master to deliver it in New York "without any charge of freight," "but shall receive instead of freight one-half of the profit arising from the sale thereof, after deducting out thereof the cost at auction, the expenses of putting it aboard and delivering and selling it at New York," and Gray was to bear any loss on the transaction.

Under this agreement the corn was brought to New York and soon after its arrival was sold at 50 cents a bushel, and witnesses have been examined as to its condition and value on its arrival. The evidence clearly shows that the corn was sold at about ten cents above its market price here; that the corn having been through a process of fermentation, is unfit for use as food for man or animals; that the purpose for which such corn is bought in this market is for making whiskey, and that it is shipped from this port to ports in the Mediterranean for that purpose. But the evidence also shows, that the corn when it arrived here was almost entirely cooled

The Bark Veronica Madre.

off; that the process of fermentation through which it had gone was arrested, and that though a very bad lot of corn of its kind, that is, damaged corn, it was worth in this market about 40 cents a bushel, sound corn being worth 56 cents a bushel. The purchaser of the corn here immediately shipped it, mixed with other corn, to Naples.

This evidence is not sufficient to overcome the great weight of the testimony, which shows, that when the sale of this cargo was determined upon, it was in the condition certified to by the surveyors and that it was then apparently fermenting and decaying; nor does it show that in the circumstances in which it then was and with the information that the master could then obtain, the sale of the cargo at Bermuda was not a wise and prudent course for the master to take. The fact that the corn brought ten cents more than it was worth, was a lucky accident for Gray, the purchaser. The fact that it arrived in New York in better condition than it was in on leaving Bermuda, that it was worth forty cents a bushel here in the condition in which it in fact arrived, were facts which it cannot be held that the master should have foreseen, and it is evident that no such thing was expected as probable by those who saw the corn in Bermuda.

The agreement between the master and Mr. Gray is one which should subject the acts and the motives of the master in making it to the most rigid scrutiny. It throws on him a very heavy burden of showing that it was made in entire good faith towards the owner of the cargo, but the circumstances and the evidence do satisfactorily show that he acted in entire good faith. The facts testified to, as to the difficulty and expense of getting ballast at Bermuda, are not controverted. All his acts from beginning to end were open and without any attempt at concealment. His efforts to save the cargo and to get proper advice as to his duty were throughout

The Bark Veronica Madre.

constant. There is no reason for believing that Mr. Ellis had any interest in the matter of promoting the sale to Gray, except to aid the master in his difficulty, and he was certainly a competent and proper person for the master to consult. He advised this course, and by his intervention secured a purchaser for the remnant of the cargo, which it might have been very difficult to sell, and at the same time secured for the master a chance to ballast his vessel without expense and possibly to earn some freight.

Nor does the fact that 11,000 bushels of the corn came safely to New York, and cooled on the voyage, with the aid of the means used by the master, as he testifies, for that purpose, show that the cargo or any substantial part of it could have been safely carried to Europe, still less that in the situation of affairs at Bermuda such a possibility should have been foreseen.

It is urged, that the master should have brought the corn to New York for account of the owner of the cargo instead of selling it. But what authority had he to do so? As the agent of the owner, he was bound to act with the intelligence and care which a prudent owner would exercise if present, but this rule is necessarily subject to the limitation that he must still act, and could only act, within the limits of his agency. He could not, as the owner could, if present, take new risks and enter on new speculations, not within the scope of his employments, and such would be the shipping of the corn to another distant market, at least unless such were *obviously* the only way in which the corn or its value could be saved to the owner.

It is suggested that the master, before selling, should have communicated with the owners for instructions. But under all the circumstances and in the urgent situation in which the condition of the cargo put him, and after his

In the matter of Charles Sumner, a Bankrupt.

attempt at Philadelphia to do so, I think he is not chargeable with fault in this respect.

On the whole case, therefore, while the rule that the master to justify a sale of the cargo must show a "moral necessity" for the sale, and must also show that he acted in perfect good faith, should be firmly adhered to in the interests of commerce, that rule is not infringed nor impaired in this case by holding the master justified in his acts by the proofs.

The libel must be dismissed with costs.

For libellants, *Blatchford, Seward, Griswold & Da Costa*,
R. D. Benedict of counsel.

For claimants, *Coudert Brothers*.

Northern District of New York.

JUNE, 1878.

IN THE MATTER OF CHARLES SUMNER, A BANKRUPT.

DISCHARGE IN BANKRUPTCY.—FORMER DECREE.—CONVEYANCE IN FRAUD OF
CREDITORS.—PROVISION FOR WIFE.

A creditor of a bankrupt opposed his discharge, on the ground that he had made a conveyance of real estate to his wife, with intent to hinder, delay and defraud creditors, and introduced, as evidence, the record of a decree in a suit in a State court, between such creditor, as plaintiff, and defendants, of whom the bankrupt was one, declaring such conveyance void, as

In the matter of Charles Sumner, a Bankrupt.

against the plaintiff, as made with intent to hinder, delay and defraud creditors :

Held, That such decree was not conclusive, as an adjudication between the same parties, establishing the fraudulent character of the conveyance ;

The conveyance was held by this court, on the facts, to have been made with intent to make a provision for his wife, in fraud of his creditors.

WALLACE, J. Bump, a creditor of the bankrupt, opposes his discharge, upon the ground that the bankrupt, on the 12th of June, 1873, made a conveyance of real estate to his wife, with intent to hinder, delay and defraud creditors. The specifications set up other grounds of opposition to the discharge, which the proofs do not sustain.

The opposing creditor produces the record of a decree in an action in the Supreme Court of this State, wherein he was plaintiff, and the bankrupt was one of the defendants, whereby the conveyance to the bankrupt's wife is declared void, as against the plaintiff, as made with intent to hinder, delay and defraud creditors ; and he now insists that this decree is conclusive here, as an adjudication between the same parties, establishing the fraudulent character of the conveyance.

I am of opinion that no such effect can be given to the decree, for the reason that the parties and the subject matter are not the same in this controversy as in the action in which the judgment was rendered, within the meaning of the rule which pronounces a judgment conclusive as evidence between the same parties, upon the same matter, directly in issue in another court. In this proceeding, all the creditors of the bankrupt are parties in interest, and, although the opposition to the discharge is directly upon the intervention of Bump alone, the result affects all the creditors of the bankrupt. If the former action had resulted in favor of the bankrupt, the judgment, surely, would not be conclusive in his favor against any creditor other than Bump who might op-

In the matter of Charles Sumner, a Bankrupt.

pose a discharge, on the ground that the conveyance in question was fraudulent. The judgment against the bankrupt, therefore, would not be conclusive in favor of such creditor. Yet, in effect, such would be the result, if the judgment operates as is now contended. If the judgment had been in favor of some other creditor, Bump could not avail himself of it here. If it had been in favor of the bankrupt and against such creditor, it would not conclude Bump here.

Again, the right now sought to be determined is one quite collateral to that which was the subject of the former action, and depends upon different considerations. A conveyance may be fraudulent as to one creditor and not fraudulent as to another; and it would be necessary for this court to examine the evidence and consider the case, before it could determine whether or not the transaction pronounced fraudulent by the judgment is one which this court would deem fraudulent for the purpose of a discharge in bankruptcy; and it would be a most illogical deduction to say that such a judgment is conclusive if this court is satisfied with its correctness, while unconclusive if not satisfactory. If the judgment had been in favor of the bankrupt, Bump could still be heard to say that the bankrupt had made a conveyance which deprives him of the right to a discharge; and, as he would not be estopped in that case, the bankrupt is not estopped now because the judgment was adverse to him.

Passing to the case upon its merits, as shown by the proofs, I am constrained to differ from the register, and am of opinion that the conveyance from the bankrupt to his wife was fraudulent as to creditors.

Without attempting to discuss the evidence, it must suffice that it has impressed me with the conviction that the bankrupt's circumstances were not such, at the time of the

In the matter of Charles Sumner, a Bankrupt.

conveyance, as to render the transaction one consistent with an honest purpose towards his creditors. If he is to be believed, he was possessed of means to pay the obligations on which he was primarily liable, and have an ample surplus. But he had assumed liabilities for a large amount, as the surety of others; his property, which was mainly in real estate, bought upon speculation, was considerably encumbered, and the value of his interests was mainly represented by the general rise in the value of real estate since his purchases, which were all of recent date. His homestead, which he proposed to settle on his wife, and which he estimated as worth from \$25,000 to \$30,000, at the time of the conveyance, was mortgaged for \$12,000, being within \$2,000 of what it had cost him; and this circumstance affords a fair and significant exhibit of his financial status generally. The transfer of other real estate to his son, without any substantial consideration; the delay intervening between the time when he divested himself of title to the real estate and the transfer to his wife, and the delay in recording the conveyance; and the intimate business relations between Brewer, for whom he was surety, and who soon failed, and himself, all tend to throw some light on his intent in the transaction, which was, in my view, to provide for his wife and son against contingencies which he perhaps did not regard as serious, but which he foresaw as possible in the near future.

A discharge is denied.

For the bankrupt, *M. W. Cooke.*

For Bump, *J. Van Voorhes.*

In the matter of People's Safe Deposit and Savings Institution.

JUNE, 1878.

IN THE MATTER OF THE PEOPLE'S SAFE DEPOSIT
AND SAVINGS INSTITUTION OF THE STATE OF
NEW YORK.

FORMER SUIT.—ESTOPPEL.

B. proved a claim against a bankrupt. Before the bankruptcy proceedings were commenced, the bankrupt had sued B. for a debt, and B. had set up said claim in defence, as a distinct cause of action against the bankrupt. The suit was tried after the adjudication of bankruptcy, and, on the trial, B. offered no evidence in support of such defence, and the bankrupt had judgment against B. The assignee in bankruptcy was not a party to the suit. He set up the judgment as an estoppel against the proving of the claim by B.:

Held, That it was not an estoppel.

WALLACE, J. Except as regards the seventh item of the claim of Buchanan, I agree with the register in his conclusions. As to the seventh item, the register holds that it should be allowed, were it not that, having set it up as a defence to the action brought by the bankrupt against him, and judgment having been recovered against him in that action, Buchanan is precluded from proving it now, upon the doctrine of *res adjudicata*.

It is not disputed that Buchanan might have litigated the claim now presented in that action, but it is contended in his behalf that, as proceedings in bankruptcy were instituted, and the plaintiff adjudged a bankrupt prior to the trial of that action, the judgment does not estop the assignee, and, therefore, does not estop Buchanan; and it is also contended, that the recovery in that action is not a bar now, because

In the matter of People's Safe Deposit and Savings Institution.

Buchanan offered no evidence upon the trial in support of his defence, and, therefore, there was no adjudication upon the merits of his claim.

It is settled, that the commencement of proceedings in bankruptcy does not, *per se*, stay the prosecution of pending suits begun against the bankrupt. (*Eyster v. Gaff*, 91 *U. S.* 521.) Proceedings upon such suits may be stayed upon the application of the bankrupt, but, if they are not, the suits proceed to judgment with the same effect as though there had been no proceedings in bankruptcy. If the cause of action involved is of the character of a provable debt, the assignee in bankruptcy, if he desires to contest it, may do so at the charge of his estate. When the suit has been brought by the bankrupt, the assignee may move to be substituted in the action, and, if he does not elect to exercise this privilege, if the case proceeds, he cannot be heard to complain of the result. So, in the present case, if the judgment had been rendered in favor of Buchanan against the bankrupt, that judgment would have been conclusive as against the assignee in bankruptcy, as an adjudication of the validity and amount of Buchanan's claim, and, as it would have been conclusive as against the assignee, it is equally conclusive in his favor, against Buchanan, as to all questions therein determined in favor of the bankrupt.

It remains, then, to inquire if the effect of the judgment is qualified or rendered nugatory because no evidence was in fact offered by Buchanan relative to the issues set up by him by way of defence. The record, upon its face, purports to be a decision in favor of the plaintiff upon an issue between the parties, wherein the plaintiff alleges that the defendant is indebted to him, and defendant alleges that plaintiff is indebted to him—a result which apparently involves the conclusion that the claim of the defendant was unfounded; so

In the matter of People's Safe Deposit and Savings Institution.

that the claim of Buchanan seems to have been decided adversely to him, upon the face of the record. It does not follow, however, that he is precluded from showing that his claim was not actually the subject of judicial inquiry and determination. The general rule is, that the judgment or decree of a court of competent jurisdiction is final as to matters thereby determined, and as to such other matters as the parties might have litigated under the issues, and which might have been determined. This is the rule, however, which prevails in cases where the former judgment is invoked as an absolute bar to a second action upon the same cause of action, and does not apply to the present case, where the judgment is not set up as a technical bar, but is sought to be enforced as an adjudication adverse to the claimant upon an issue which might have been litigated in the former action. In its application to such a case, the rule is well stated by Mr. Justice Field (*Cromwell v. County of Sac*, 94 *U. S.* 352): "In all cases where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the former action, not what might have been thus litigated and determined."

While it is true that the claim of Buchanan might have been litigated in the former action, and while the presumption that it was actually litigated arises from the record, yet this is only a presumption, and it may be controverted and overthrown by proof *dehors* the record. A great variety of cases illustrate the extent to which the presumption arising from the record may be repelled; as, where the trial went off on a technical defect, or because the debt was not due, or because the plaintiff was under a temporary disability. Thus, it is competent to show that a *nolle prosequi* was entered as

In the matter of People's Safe Deposit and Savings Institution.

to a claim embraced in the pleadings, or that a part of the controversy was specifically withdrawn from the consideration of the Court (*Brockway v. Kinney*, 2 Johns. 210; *Snider v. Croy*, 2 Johns. 227; *Louw v. Davis*, 13 Johns. 226; *Foster v. Milliner*, 50 Barb. 395), in which case the judgment in the former suit is not, as to the claim withdrawn, a bar. It is not necessary to show that the cause of action was affirmatively withdrawn from the consideration of the Court. It is only necessary that it appear that the real merits of the second action have not been decided in the first; and this follows, if it is shown that the second suit has not in fact been litigated in the first. (*Sedden v. Intap*, 6 Term R. 607.) If the cause of action has been litigated, however slightly or ineffectually, it cannot be said that it might not have been determined. The case of *Sedden v. Intap* was one where the plaintiff in a former action declared on a promissory note and for goods sold, but, upon executing a writ of inquiry, after judgment by default, gave no evidence on the count for goods sold, and it was held that the judgment was not a bar to his recovering for the goods in another action. This case has been recognized and approved by many authorities, and is directly in point here, where, as in *Sedden v. Intap*, the proof is that no evidence was given concerning the issue now pending between the parties. Another case directly in point is *Burnwell v. Knight*. (51 Barb. 267.)

The effect of the judgment, as to the defence interposed by Buchanan, is analogous to that of a judgment by default upon failure of the party to appear. He was in Court, but was silent. If the plaintiff could not have recovered without disproving expressly or by necessary implication, the existence of the facts set up by way of defence, the judgment would be an estoppel, because the estoppel is not confined to the judgment, but extends to all facts involved in it as neces-

In the matter of Solomon Beisenthal and Henry Henschel, Bankrupts.

nary steps or the groundwork upon which it must have been founded. (*Burlin v. Shannon*, 99 *Mass.* 203.)

As an adjudication that Buchanan was liable to the plaintiff in the amount of the judgment, as for an existing and valid indebtedness, the judgment is conclusive; but it does not determine, expressly or by necessary implication, that the plaintiff was not liable to Buchanan upon a distinct and independent cause of action.

From these views it follows, that the claim of Buchanan comprised by the seventh item of his account must be allowed. As I agree with the register in his conclusions, and in the reasons by which they were reached relative to the other items of the claimant's account, it is unnecessary to advert to the questions therein involved.

For Buchanan, *A. M. Beardsley*,

For the bankrupt, *G. W. Adams*.

JUNE, 1878.

IN THE MATTER OF SOLOMON BEISENTHAL AND
HENRY HENSCHER, BANKRUPTS. *

VOLUNTARY ASSIGNMENT.—EXECUTION.—LIEN.—FORMER JUDGMENT.—
TITLE OF ASSIGNEE IN BANKRUPTCY.

B. made a voluntary assignment to C., for the benefit of his creditors. After that an execution was levied on the property assigned. Subsequently a petition in bankruptcy was filed against B. Thereafter C. sued the sheriff in trespass, because of the levy. B. was afterwards adjudged a bankrupt.

* See *In the matter of Beisenthal*, 14 Blatch. 146, and *Lindor vs. Lewis*, *post*.

In the matter of Solomon Beisenthal and Henry Henschel, Bankrupts.

The goods were then sold, and the assignee in bankruptcy held the proceeds subject to the lien of the execution if any. The suit of C. against the sheriff was then tried, and in it the sheriff set up that the assignment from B. to C. was fraudulent and void as to creditors, and had a verdict and a judgment in his favor. The assignee in bankruptcy had, in a suit against C., set aside the assignment from B. to C., as being in violation of the bankrupt law. The sheriff then applied to the bankruptcy court to pay him, on the execution, the proceeds of the sale :

Held, That the assignee in bankruptcy derived his title through C., and was estopped by the judgment ; that the lien of the execution was valid, and that the sheriff was entitled to be paid the proceeds of the sale to the extent of the lien.

Beisenthal and Henschel made a voluntary assignment for the benefit of their creditors, July 19th, 1876, to Herman Cohen. The sheriff of Erie County, under an execution against Beisenthal and Henschel, in favor of Adam, Meddrum and Anderson, levied on the assigned property, September 6th, 1876. September 14th, 1876, a petition was filed by creditors, asking that the assignors be declared bankrupts. September 22nd, 1876, Cohen commenced an action of trespass against the sheriff, to recover for damages sustained by reason of the levy. September 26th, 1876, an adjudication of bankruptcy against Beisenthal and Henschel was made, and, soon after, upon an application to this court, the sheriff was permitted to sell the goods levied on, and directed to pay the proceeds to the assignee in bankruptcy, to be held subject to the lien of the execution, if any. The action brought by the voluntary assignée against the sheriff was tried in February, 1878. The sheriff defended on the ground that the voluntary assignment from Beisenthal and Henschel to Cohen was fraudulent and void as to creditors and a verdict was found for the defendant. The sheriff now applies, upon petition, asking, by reason of the foregoing facts, that he be adjudged entitled to the proceeds of the sale, under his execution.

In the matter of Solomon Beisenthal and Henry Henschel, Bankrupts.

WALLACE, J. If the voluntary assignment from Beisenthal and Henschel to Cohen was fraudulent as to the creditors of the former, inasmuch as the sheriff's levy was made prior to the filing of the petition in bankruptcy, the levy conferred a valid lien, viz., the right to seize and sell the property under the execution, both as to Cohen, the voluntary assignee, and as against the assignee in bankruptcy. If the assignment was not fraudulent, the title of the property covered by it had passed to Cohen prior to the levy, and the levy did not confer a lien. The assignment was void as to the assignee in bankruptcy, and has been so determined, not because it was fraudulent as to creditors, but because it was made with intent to prevent the property coming to the possession of the assignee in bankruptcy and from being distributed under the bankrupt Act. If the sheriff had no lien at the time the petition in bankruptcy was filed, he did not acquire one when the assignment was set aside, at the suit of the assignee in bankruptcy. The reasons which lead to these conclusions are more fully set forth in *Johnson v. Roger* (15 N. B. R. 1), and *In re Beisenthal* (15 N. B. R. 228).

The only question, therefore, to be decided now, is, whether or not the judgment in favor of the sheriff, in the action brought by Cohen, the voluntary assignee, whereby it was determined that the assignment was fraudulent, is conclusive upon the assignee in bankruptcy, as an estoppel. Certainly, the assignee in bankruptcy, upon setting aside the voluntary assignment to Cohen, gets no better title to the property than Cohen had. He gets what Cohen got and nothing more. Now, it has been determined by a court of competent jurisdiction that Cohen did not have title to the property levied on by the sheriff, and that the sheriff acquired a valid lien upon it by his execution. Upon the rule that such a judgment is binding upon privies as well as upon

In the matter of Solomon Beisenthal and Henry Henschel, Bankrupts.

the immediate parties to the action, the assignee in bankruptcy, whose title is derived through Cohen, is estopped by the judgment.

It is argued, however, that the assignee in bankruptcy does not claim under Cohen, but by a paramount title and in hostility to him. In a general sense, this theory is correct, but it is not true as to this particular transaction. If it were not for the title of Cohen, the sheriff would have acquired a valid lien by his levy, and been entitled to hold the property as against the assignee in bankruptcy; because he had taken it under execution against the owners prior to the institution of proceedings in bankruptcy. The assignee in bankruptcy, therefore, has no title except that which enures to him through the title of Cohen. Cohen was in a position to insist that an assignment to him, valid as against the execution of the sheriff, stood between the title of the judgment debtors and the sheriff; and the assignee must affirm this position before he can assert any claim against the sheriff. As to the sheriff and the property levied on by him, the assignee in bankruptcy, therefore, claims under Cohen, and is in privity with him.

A decree is ordered, adjudging the sheriff's lien valid, and directing the assignee to pay over to the sheriff the proceeds of the sale, to the extent of the lien.

For the sheriff, *S. S. Rogers.*

For the assignee, *N. Morey.*

Southern District of New York.

JULY, 1878.

JOHN R. TARLETON, *ET AL.*, VS. CHARLES MALLORY, *ET AL.***SEAMEN'S WAGES.—WRECK.—TIME OF DISCHARGE.**

A steamer went ashore on February 4, 1876. The master did not abandon hope of getting the vessel off till March 10th. Up to February 16th the crew remained on the shore by the vessel, engaged under the master's orders in taking the cargo out and stripping the vessel. On the 16th of February the provisions gave out, and the crew were sent to Nassau, N. P., where they were retained by the master's direction till March 10th, when they were discharged. They were paid wages up till February 4th, and on returning to New York they filed a libel against the owners, claiming to recover wages up to March 10th. The owners defended, claiming that under § 4526 of the Revised Statutes of the United States, the seamen's right to wages ceased on the wreck of the vessel on February 4th, and that for their subsequent services they would be entitled only to salvage compensation, to be paid out of the proceeds of the wreck:

Held, That the seamen were bound to continue their services as long as there was any hope of saving the ship; that the master must be held to have the power, as a general rule, to determine whether there is any hope of getting the ship afloat, and until he gives it up, the owners cannot object to paying wages on the ground that there was no chance of saving her; and that the libellants, therefore, were entitled to recover.

CHOATE, J. This is a libel *in personam* against the owners of the steamship Galveston for seamen's wages. The steamship went ashore on the 4th of February, 1876, on a coral reef on the Island of Maryguane, on her voyage from New York to Port au Prince and return. The master did not discharge the crew, but under his orders they remained

John R. Tarleton, *et al.*, v. Charles Mallory, *et al.*

by the steamship, living on the beach till the 16th of February, and during this time they were engaged under his orders in taking the cargo on shore and protecting it, in stripping the ship and taking on shore whatever was taken from the vessel. On the 16th of February they were sent to Nassau by direction of the master, and there remained till the 10th of March, when they were discharged. The reason for sending them to Nassau was that provisions gave out at the place of the wreck. Up to the 10th of March the master had not abandoned all hope of getting the steamship off, and he kept the crew at Nassau in order that, if he got her off, they might go on in her. The crew have been paid up to February 4th. The question is whether they are entitled to their wages to any later time, and if so to what time? Revised Statutes § 4526 provide: "In cases where the service of any seaman terminates before the period contemplated in the agreement, by reason of the wreck or loss of the vessel, such seaman shall be entitled to wages for the time of service prior to such termination, but not for any further period."

It is claimed by the defendants, the owners of the steamship, that in this case the service was terminated by the wreck or loss of the vessel on the 4th of February, when she got aground. The statute implies that by the wreck or loss of the vessel the agreement of the seamen is terminated. It does not introduce any new rule as to when the service will terminate, but refers to the established rule of the maritime law. And the law undoubtedly is, that upon a disaster befalling a ship, as by stranding in this case, the seamen are bound by their contract to stand by her so long as there is any hope of saving the ship or the cargo, and the master may, until such hope is abandoned, command their services, and they are entitled to be paid their wages while thus held by the master after the stranding. And it is wages they are

John R. Tarleton, et al., v. Charles Mallory, et al.

entitled to, and not a salvage compensation out of what may be saved from the wreck, as the defendants claim. Now, although this vessel was in a desperate condition after the 4th of February, the seamen continued to serve in saving the cargo and parts of the ship, and were lawfully kept in readiness to continue the voyage if she should be got afloat. The master must be held to have the power, as a general rule, to determine whether there is any hope of getting the ship afloat, and until he gives it up the owners cannot object to paying the wages on the ground that there was no chance of saving her. The case of *The M. M. Culeb* (9 Ben. 159), cited by defendants, is not in point. There the ship had actually sunk. It did not admit of any question that she was lost. That necessarily terminated the service of the seamen. The law of the present case is carefully stated in the case of *The Warrior*. (Lush. 476.)

Decree for libellants, with costs and reference to compute.

For libellants, *Benedict, Taft & Benedict*.

For defendants, *Owen & Gray*.

Joseph Linder, Assignee, v. Frederick Lewis *et al.*

JULY, 1878.

**JOSEPH LINDER, ASSIGNEE IN BANKRUPTCY OF
WALLACK & CO., vs. FREDERICK LEWIS ET AL.***

VOLUNTARY ASSIGNMENT.—EXECUTION LIEN.—PRIORITY.

On the 28th of June, 1875, the firm of W. & Co. made a voluntary assignment to L. Thereafter K. & Co., H. W. & Co., L. & Co., and C. & Co. obtained judgments against W. & Co. and issued executions, under which the sheriff levied on the goods formerly belonging to W. & Co. and then in the possession of L. as assignee. L. notified the sheriff of his claim and the sheriff called on the execution creditors for indemnity, which each of them gave, and the sheriff proceeded to sell the goods. Before the sale, C. & Co. notified the sheriff that they withdrew the indemnity which they had given and that he must proceed only by virtue of the direction endorsed on their execution. The sheriff sold the property for \$2606, which he applied on the executions of K. & Co. and L. & Co. and returned the others unsatisfied. Thereafter on the 3d of September, 1875, proceedings in bankruptcy were commenced against W. & Co. by other creditors, the act of bankruptcy alleged being the making of the voluntary assignment to L. They being adjudged bankrupts and an assignee having been appointed, he filed a bill in equity against L. and against the execution creditors to set aside the assignment to L. and to compel the execution creditors to account to him for the property taken under their executions :

Held, That the title of the assignee in bankruptcy related back to the time of the making of the voluntary assignment and that the intervening levies of the judgment creditors were therefore cut off ;

That the sheriff and the judgment creditors, except C. & Co., must account for the property taken under their executions ;

That as to C. & Co. the bill must be dismissed, because the sale was not their act ;

That L., having done all that he was bound to do to protect the property, was not liable to account for the property sold on execution.

Held, also, that as the evidence proved only that the assignment was void under the bankrupt law, the assignee was not estopped to deny that it was

* See In the matter of Beisenthal, *ante* p. 43.

Joseph Linder, Assignee, v. Frederick Lewis *et al.*

absolutely void under the law of New York, by the fact that it was averred in the creditors' petition to have been made with intent "to hinder and defraud creditors," especially as the petition averred also as an act of bankruptcy that it was made in contemplation of insolvency and to defeat the bankrupt law, and the adjudication may have been decreed under this last averment.

It seems that the averments of the creditors' petition as to the act of bankruptcy are not conclusive on the assignee.

CHOATE, J. This is a suit in equity brought by an assignee in bankruptcy to set aside a voluntary assignment for the benefit of creditors. The assignment sought to be set aside was made June 28, 1875. The proceedings in bankruptcy were commenced by creditors' petition, Sept. 3, 1875. After the assignment and before the filing of the petition in bankruptcy, certain creditors of the bankrupts recovered judgment against them and issued their executions. The sheriff levied on the stock of goods, formerly of the bankrupt and then in the possession of the defendant Lewis, as their assignee. Lewis notified the sheriff of his claim, and the sheriff called on the execution creditors, whose executions he then held, namely, the defendants, William Kiefer & Co., Henry Wellstern & Co., Frank Leisler & Co. and Elliott C. Cowdin & Co., for bonds of indemnity, and they complied with the demand and gave the sheriff the customary bonds. The executions of Kiefer, Wellstern and Leisler were put in the sheriff's hands, July 9, at 11.55 a.m. and Cowdin's on the same day at 3.35 p.m. The other executions, those in favor of Muratt and Hershmann & Co., were put in the hands of the sheriff on the 15th and 16th of July. A jury was called and found the title in Lewis. The sheriff having received the bonds, proceeded with the sale of the property seized. The sale took place July 19. Before the sale took place, Cowdin & Co. notified the sheriff that they withdrew their bond of indemnity, that it was given under a misapprehension in the absence

Joseph Linder, Assignee, v. Frederick Lewis *et al.*

of their attorney, and directed him to proceed only by virtue of the direction endorsed on the execution and as he would have done if no bond had been given. The direction on the execution was to levy and collect the amount of the judgment with interest and charges. The property sold for \$2606, which the sheriff applied to satisfaction of the executions of Kiefer & Co. and Leisler & Co. and his own fees. The other executions have been returned wholly unsatisfied.

The complainant is clearly entitled on the proofs to a decree avoiding as against him the assignment to the defendant Lewis. It is the settled law in this Circuit, that when a voluntary assignment is avoided as a fraud upon the bankrupt law, the title of the assignee in bankruptcy relates back to the time of the execution of the voluntary assignment and thus cuts off intervening levies by judgment creditors of the assignor. (*In Re Beisenthal*, 15 N. B. R. 228.) It is claimed, however, by the judgment creditors that the assignment in this case was not merely voidable as against the assignee in bankruptcy, but that it was absolutely void, and also void as against these judgment creditors, because made to delay and defraud them, and that therefore they had a right to treat it as a nullity and to levy on the goods as the property of the assignor. But the evidence does not show any invalidity in the assignment other than that alleged in the bill, and fully proved, that it was made in contemplation of insolvency and with intent to defeat the bankrupt law. The assignment was therefore voidable merely, and not void, and the case cannot be distinguished from *In Re Beisenthal*. Nor is there any force in the suggestion that the assignee in bankruptcy is estopped to claim that the assignment was made with a different intent from that alleged in the creditors' petition on which the adjudication was made. The petition charges the making of this assignment "with intent to hinder and defraud

ore litors," as one of several acts of bankruptcy. The averments of the petition are not inconsistent with those of the bill, and if they were, it is not perceived that an adjudication on the petition ought to be held to estop the assignee if the facts are erroneously stated in the petition, especially where the facts properly stated would support the adjudication, and for aught that appears the adjudication was also well made upon the other alleged acts of bankruptcy.

The complainant is also entitled to a decree against the sheriff and all of the judgment creditors, by whose direction the sheriff sold the goods covered by the assignment. The three creditors, Kiefer & Co., Wellstern & Co. and Leisler & Co., are all responsible to account for this property because it was sold by their direction and procurement, and although two of them only have received the proceeds. The sale was the act of all. The sale does not justify either them or the sheriff, having been made in violation of complainant's rights and they must be held to account for the value of the property at the time they took it.

The notice given by Cowdin & Co. withdrawing their bond was clearly in its effect a direction to the sheriff not to sell except on his own responsibility. The circumstances were such that he was under no obligation to sell on their execution without receiving a bond of indemnity, and his subsequent acts after receiving the notice cannot be deemed to have been done under their execution. They were not called on to withdraw the execution or to countermand the direction endorsed on it. It was proper for them, while declining to give him the authority to sell this property on their account, to leave the execution for service, according to the ordinary course of business, till it should be in due time returned by him. No case for relief therefore is made out against the defendants Cowdin & Co.

In the matter of Ozias L. Nims and David Long, Bankrupts.

The defendant Lewis appears to have done all that was required of him as assignee to protect the property against the claims of the judgment creditors. He had no power to prevent the sheriff from selling, and he cannot be required to account for the goods so sold. He must account for all the other property which came to him as assignee.

Decree to be entered in accordance with this opinion.

For complainant, *C. C. Yeaman*.

For judgment creditors, *M. H. Regensberger*.

For defendant Lewis, *W. B. Putney*.

For sheriff, *H. F. Bookstaver*.

For Cowdin & Co. *J. D. Taylor*.

Northern District of New York.

JULY, 1878.

IN THE MATTER OF OZIAS L. NIMS AND DAVID LONG, BANKRUPTS.

DISTRIBUTION OF ASSETS.—JOINT CREDITORS AND PARTNERSHIP CREDITORS.

N. and L. were partners under the name of N. & Co., and as such contracted debts and failed without assets. Thereafter they began business again as partners under the name of "N., agent." They contracted debts and failed, leaving assets, which came into the hands of an assignee in bankruptcy, but were insufficient to pay the debts contracted under the name of "N., agent:"

Held, That the creditors of N. & Co. were entitled to share in the assets equally with the creditors of "N., agent."

In the matter of Ozias L. Nims and David Long, Bankrupts.

WALLACE, J. The bankrupts were formerly partners under the firm name of "O. L. Nims & Co.," and as such contracted debts and failed without assets. Shortly thereafter, they commenced business again as partners, under the firm name of "O. L. Nims, agent," and as such, contracted debts and failed, leaving assets which are now in the hands of their assignee in bankruptcy for distribution. The assignee insists that the creditors of O. L. Nims & Co. are not entitled to share with the creditors of O. L. Nims, agent, in the assets of the latter firm, such assets being insufficient to pay the creditors of O. L. Nims, agent, in full.

I am of opinion that the creditors of each firm are to share ratably in all the joint assets of the bankrupts, and that neither section 5121 of the Revised Statutes, nor the rule of equitable distribution, which that section is intended to adopt, precludes the creditors of the bankrupts jointly from resorting to any joint assets of the bankrupts which may exist. The language of section 5121 does not in terms prescribe the rule of distribution when debts are proved against the bankrupts jointly which are not partnership debts; but it deals only with the mode of distribution as between partnership creditors and creditors of the partners separately; and where the rights of these classes of creditors are involved, applies the equitable rule that the joint property shall be first applied to pay the joint debts and the separate property the separate debts of the partners respectively.

The creditors of O. L. Nims & Co. are no more creditors of the bankrupts separately than are the creditors of O. L. Nims, agent. Both classes are joint creditors. The creditors of O. L. Nims, agent, can resort to the separate property of the bankrupts, as fully as the creditors of O. L. Nims & Co. can; why should not the latter be permitted to resort equally with the former to any joint assets?

In the matter of Ozias L. Nims and David Long, Bankrupts.

The case may be considered as though the bankrupts had been carrying on business together, in two distinct firms, at the same time, in which they were the only partners. . If that were the case, could it be maintained that the property of each firm should be kept distinct and appropriated first to the payment of the debts of that firm, or would the assets of both constitute a common fund for the payment of all the joint debts? Neither the language of the bankrupt Act nor any principle of equity, or any rule of administration in bankruptcy of which I am aware, requires the assets of each concern to be marshalled so that the debts of each shall be paid from the assets of each, respectively.

The principles of distribution in equity have their origin in the rights of the creditors at law. At law, the creditors of the firm may resort in the first instance to the separate as well as to the joint property of the parties, while the separate creditors of a partner can not resort effectually to the joint property, because upon an execution they can reach only the interest of the partner and are thus obliged to invoke the aid of a court of equity, to ascertain it through an accounting, in which case the creditors of the firm must first be satisfied, and thus obtain a priority as to the joint assets. But suppose an execution to be levied in favor of a creditor against all the members of the firm, upon a joint debt, but not on a partnership debt; here the sale would carry the title of all the partners, and the creditors would not be under the necessity of having an accounting, or invoking the assistance of a court of equity. There would thus appear to be a solid distinction between the rights of a creditor of all the partners, and those of one or more partners, in the joint property, as respects the partnership creditors; and the case would not arise for the application of the equitable rule

In the matter of Ozias L. Nims and David Long, Bankrupts.

which postpones the separate creditor to the partnership creditor in the joint assets.

Courts of bankruptcy marshal assets on equitable rules, and these rules give to creditors all their legal rights when the enforcement of these rights does not conflict with any equitable principles. The rights at law of creditors of the partners jointly are equal to those of the creditors of the partnership, and no equitable rule is violated if both classes are placed upon an equal footing. Chief Justice Marshall, in speaking of the English rules for marshalling the joint and separate estates in bankruptcy, says: "The rules which we find laid down by the chancellor for marshalling the respective funds, are to be considered merely equitable restraints on the legal rights of parties, obliging them to exercise those rights in such manner as not to do injustice to others." (*Tucker v. Orley*, 5 *Cranch* 35.) If the rules of distribution originated in the presumption that a partnership debt was incurred for the benefit of the partnership, and that the property consists in whole or in part of what has been obtained from creditors, and is therefore considered as a primary fund for the payment of such debts, there would be strong reason in favor of the position now taken by the assignee; but after a very careful reading of the books, I am unable to find any case in this country or in England which advances this view, except the dictum in *Forsyth v. Woods*, 11 *Wall.* 486. That this is not the foundation of the rule which gives partnership creditors priority over separate creditors as to joint property, seems to be indicated by the cases which postpone the partnership creditors when there has been a conversion of joint into separate property. It is well-settled that partners may, during the continuance of the partnership, by agreement, convert joint into separate estate, or *vice versa*. This conversion determines the character of the property, for the purposes of

In the matter of Ozias L. Nims and David Long, Bankrupts.

its distribution in bankruptcy. (Collyer on Part., § 881, etc.) Accordingly, when one partner without fraud sells out to the other, the property becomes separate property, and the creditors of the firm are postponed to the separate creditors of the purchasing partner. If the rule of distribution is founded on the theory that the fund which is derived from the creditors is primarily the fund for their payment, and the law, therefore, appropriates it to them, it could not be permitted that the debtors themselves, by agreement, should defeat this result.

I have not overlooked the English bankruptcy cases, which permit proof between estates where several partners are in bankruptcy, some of whom formed a distinct firm, carrying on a distinct trade from that of the general partnership, and the articles of one trade were furnished by one firm to the other (Story on Part., § 394), by which an appropriation of the assets of each firm to its debts is worked out. In these cases the debts were not the debts of all the partners jointly, nor were the assets those of all the partners; and the result reached was precisely that which would be obtained by applying the joint assets to the joint debts of the several individuals.

My conclusion, therefore, is, that the joint creditors of the partners are entitled to share equally with the partnership creditors, in the partnership assets; in other words, that joint creditors share equally in joint assets, whether their debts are partnership debts or not.

For creditors, *Sherman S. Rogers.*

For assignee, *William H. Greene.*

JULY, 1878.

IN THE MATTER OF JOSEPH MELLOR AND JOHN
MELLOR, BANKRUPTS.

PRIORITY.—SALE BY WARDEN OF A STATE PRISON.

S., who was the warden of Clinton Prison, in the State of New York, sold to M. & Co. goods which were the property of the State. Thereafter M. & Co. being in bankruptcy, S. filed a proof of debt for the price of the goods, stating the debt to be due to him as agent and warden of Clinton State Prison. A priority for the debt was claimed as due in fact to the State of New York:

Held, That the debt was entitled to such priority.

WALLACE, J. This case involves the question whether a claim proved by James C. Shaw and stated in the proof of debt to be due to him as agent and warden of Clinton State Prison, is entitled to priority in the distribution of the bankrupt's estate, as a debt due to the State of New York.

Disregarding for the present the form of the proof, and going behind that to the evidence produced upon the re-examination of the claim, I am of opinion that the debt is in fact a debt to the State of New York, and as such entitled to priority. It is a debt for merchandise sold to the bankrupts, which at the time of the sale was the property of the State. It was sold by the warden of Clinton Prison as the agent of the State. I am aware of no reason why the State cannot maintain an action to recover the price of the merchandise upon the same rule which authorizes any other principal to sue upon the contract of an agent made in behalf of the principal. If the State can maintain an action, it can prove the claim against the estate of the bankrupts. Doubtless, the

In the matter of Joseph Mellor and John Mellor, Bankrupts.

warden could maintain an action to recover the price of the goods, because where a public office is created by the State, an implied authority is conferred in the officer to bring all suits which the proper discharge of his official duty requires; but this is not inconsistent with the right of the State to adopt his contract and sue upon it.

My attention has been called to the case *In re Corn Exchange Bank* (15 N. B. R. 431), and to that in 11 Metcalf 129, cited in the former case. These cases are not applicable here. They were decided upon the assumption that, under the statutes regulating the rights and responsibilities of wardens of State Prisons in Wisconsin and Massachusetts, the warden was in effect a contractor with the State, and chargeable as such with all moneys that came to his hands, and not responsible as an agent to his principal; and, therefore, when he had deposited the money in a bank which failed, it was his money and his loss, and the State had no priority in bankruptcy. Under the laws of this State no personal liability is imposed upon a warden of a prison for contracts made officially, and no action could be maintained against him by other parties to the contract, neither could an action be maintained against him officially or his successor in office. He has no control over the funds transmitted to him, except to apply them to the specific uses for which they are designated. So far as he is invested with any duty in regard to the moneys of the State, it is that of an agent, merely, to obey the directions of other officers of the State to whom in this behalf he is a subordinate.

For the State, *William A. Beach.*

For assignee, *Martin A. Knapp.*

The Steamship Colon and her Cargo.

Southern District of New York.

AUGUST, 1878.

THE STEAMSHIP COLON AND HER CARGO.**SALVAGE.—DAMAGE TO CARGO BY DETENTION.—COSTS.—PARTIES.—BURDEN OF PROOF.**

The steamer C., while on a voyage from New York to Colon, became disabled on the 20th of August, 1878, by the breaking of her crankshaft. She was otherwise tight and staunch, was provisioned for several months, and could make some progress under sail. She was then about 200 miles from Nassau, N. P., and about 781 miles from New York, for which port her master determined to make. The weather was fine and the sea smooth. During that afternoon the steamer E., bound from Kingston, Jamaica, to New York, in answer to a signal from the C. came alongside, and an agreement was made between the masters of the two vessels that, the C., having requested to be towed by the E. to New York, the compensation for the assistance rendered should be settled by the companies in interest in New York. Each vessel furnished its hawser for the service, and the E. reached New York in safety with the C. in tow on the morning of August 26th, the weather during the voyage being fine, and the winds favorable. The C. was worth about \$230,000, and her cargo was worth about \$250,000, and she had 140 passengers. The E. was worth about \$120,000. Her cargo was worth about \$100,000, and she had thirty-nine passengers. She was detained about two days and a half in rendering the service. No agreement as to the amount of compensation for the services of the E. was arrived at between the owners of the two vessels. Two days after their arrival the owners of the E. demanded \$150,000 salvage, and the next day filed their libel and attached the C. and her cargo for that amount. There was some delay in furnishing security, and the transshipment of the cargo of the C. to another vessel of the line to which she belonged, and the sailing of that vessel, were delayed thereby.

Part of the cargo of the E. consisted of fruit, and its consignees intervened in the suit, claiming to recover the damages caused to such part of the cargo

The Steamship Colon and her Cargo.

by the delay. It had been shipped under bills of lading which in terms authorized the E. to tow and assist vessels in all situations. On behalf of the E. it was claimed that she had been put to expense amounting to \$2,340, and that she had lost \$2,500 freight on her next trip, but this latter claim was abandoned on the trial:

Held, That the service rendered was a salvage service, but that the claim of the E. was exorbitant;

That the dangers to which both vessels were exposed during the service had been exaggerated;

That the policies of insurance on the E. and her cargo not having been produced, the presumption was that by their terms the E. was authorized to render such services;

That \$10,000 was a reasonable compensation to the E. and her ship's company for the service rendered, \$500 of it to be paid to the owners of the E. for expenses, \$750 to the master of the E., and the rest, half to the owners of the E. and the other half to be divided among the officers of the E., including the master and her crew, according to their wages;

That the owners of the cargo of the E. who had intervened might also recover the damages which they had sustained by reason of the detention, such damages being the difference between the value of their cargo when delivered and what would have been its value if delivered without detention; and that their right to recover such damages was not affected by the above mentioned clause in the bills of lading under which the cargo was shipped;

That the libellants should not recover costs, except that the costs of the reference to ascertain the damage to cargo should abide the event.

CHOATE, J. This is a libel brought by the owners, master and crew of the steamship Etna, against the steamship Colon and her cargo, claiming compensation as for a salvage service in towing her into the port of New York, when disabled by the breakage of her machinery at sea. Some of the consignees of cargo by the Etna have joined as co-libellants, claiming for damage through detention in the voyage to their goods, which being fruit, it is claimed became worthless or damaged by decay, before arrival, and which, but for the detention, would have arrived in good condition.

The Colon is an iron steamship of 2,686 tons burden, belonging to the Pacific Mail Steamship Company. She

The Steamship Colon and her Cargo.

left New York on the 17th of August, 1876, with a hundred and forty passengers, and a crew of seventy-four men, including officers, and a general cargo of merchandise not perishable, valued at \$250,000, bound for the port of Colon, by way of Crooked Island passage. On the 20th of August, at eleven o'clock in the forenoon, she broke her low pressure crank shaft in the crank. The effect of the accident was, that her machinery was wholly disabled, and her propeller rendered useless. By the accident two men were killed, the four columns that supported the cylinders were broken, and other parts of the machinery badly damaged. She was then in latitude $28^{\circ} 17'$ north, and longitude $74^{\circ} 4'$ west, about 731 miles from New York, and 200 miles from the nearest port, which was Nassau, New Providence. In all other respects, except as to her machinery, she was tight, staunch and strong. She had on board an ample supply of provisions to keep the sea for several months. She was a two-masted steamer, brig-rigged and furnished with two top-gallant sails, two upper top sails, two lower top sails, two courses, one fore stay sail, one fore top mast stay sail, one fore spencer, one gaff top sail, one main stay sail and one main spencer. At the time of the accident, the sea was smooth, the weather fine and the wind light from the W. S. W. About half an hour after the accident, the ship was got under all sail. The damage to the machinery was such that it could not be repaired at sea and the master decided to make for the port of New York. He then expected the Etna to pass within speaking distance, on her regular trip from Kingston or Port au Prince to New York, and the Acapulco, a steamship of the same line with the Colon, would be also due in that vicinity, in about three days, on her passage from Colon to New York, in case she took the Crooked Island passage. She sometimes took another route, which would have carried her a

The Steamship Colon and her Cargo.

hundred miles further to the westward. Having got all sail on the ship, the master attempted to wear, but the wind being light and the propeller not being disconnected, he was unable to do so, and the ship made headway to the southward, about a knot and a half an hour, and drifted to the eastward, at about the same rate. After attempting to wear for about an hour, she made a French brig, and lay to, spoke and boarded the brig, and sent despatches by her. She then continued her efforts to wear, with the same result as before, until she made the Etna, which was at three o'clock and forty-five minutes in the afternoon. The course of the Etna was to the westward of the Colon, and she was bound to New York. The Colon set a signal which indicated that she wished to communicate close with the Etna, and soon after the Etna, in response to the signal, bore down upon her, the Colon being then nearly abeam, and distant from six to eight miles. The Etna having rounded to under the lee of the Colon, the master of the Colon came on board the Etna and he and the master of the Etna had an interview, in which the master of the Colon told the master of the Etna that his machinery was disabled, and that he wished the Etna to tow him back to New York. After some hesitation on the part of the master of the Etna, it was agreed that he should do so. The subject of compensation was mentioned, and, at the suggestion of the master of the Colon, it was agreed that that should be left to be determined by the parties in interest in New York, and an agreement in writing was drawn up and signed by them, as follows:

“ At sea, August 20th, 1876.

Lat. 28° 17' N., Long. 74° W.

On board SS. Etna.

“We, the undersigned, do hereby agree as follows: The P. M. S. S. ‘Colon’ being disabled as to her machinery, but

The Steamship Colon and her Cargo.

in other respects tight, staunch and strong, asks the Atlas S.S. 'Etna' to tow her the 'Colon' to New York.

"The undersigned, Capt. S. P. Griffin, of the 'Colon,' stipulates that compensation for the assistance to be rendered shall be settled by the companies in interest in New York; and the undersigned, Capt. J. W. Sanson, of the 'Etna,' accepts the stipulation of Capt. S. P. Griffin, and for his part will render the assistance mentioned upon the terms stated."

The Etna was furnished with only one hawser, suitable for the purpose of assisting in towing the Colon. It was a ten-inch hawser, which had been in use on the Etna for two years or more, but was in good condition. The Colon had a larger hawser, new, that had never been used. Before the captains separated, it was arranged that both hawsers should be used in towing. The agreement having been made, the master of the Colon returned to his ship. The hawser of the Colon was passed on to the Etna, and that of the Etna on to the Colon. This service was performed by the crew and the boat of the Colon. The hawsers were made fast to the after bitts on the quarter deck of the Etna on either side, and the Etna resumed her voyage for New York with the Colon in tow. They got under way about seven o'clock in the evening of the 20th of August, and arrived off Sandy Hook shortly before midnight, on the 25th, and came up the bay early in the morning, on the 26th. From the 20th to the 26th, the weather was fine, and the winds for the most part light and favorable, and during most of the time, the ships carried sail. They arrived in safety and without accident, except the stranding of the hawser of the Etna, on the 21st, which does not appear to have been caused by any defect in it. In consequence of the inequality in the strength of the hawsers, they were so arranged that that of the Colon bore a greater part of the strain of the towage than that of the Etna.

The Steamship Colon and her Cargo.

The Etna is an iron steamship of 1,274 tons burden, belonging to the Atlas Steamship Company (limited), running regularly between New York and ports in the West Indies, usually between Port au Prince and New York, but on this trip she stopped at Kingston, for the mails. On the 17th of August, 1876, she left the port of Kingston, Jamaica, with thirty-nine passengers and a general cargo of merchandise, valued at about \$100,000. She also carried the mails from Kingston to New York. Her cargo consisted in part of fruit, bananas and limes, shipped green and liable to decay before arrival, if detained on the voyage. The value of the Colon and her stores was about \$230,000. The value of the Etna was about \$120,000. The regular and usual length of the Etna's passage, from Kingston to New York, is seven days, and but for the detention, she would have been due in New York early in the morning of the 24th. She was therefore detained two days. Her master claims that he was ahead of his time when he bore away for the Colon, and might have arrived on the afternoon of the 23rd. So that the detention was at the utmost two days and a half.

All the cargo of the Etna was shipped under bills of lading which permitted the Etna to tow and assist vessels in all situations. All the cargo of the Colon was shipped under bills of lading, which exempted the Colon from liability for damage arising from accidents to the machinery. There is evidence that the defect in the crank, which resulted in the damage to the machinery, was a latent defect which could not have been discovered by examination prior to the breakage.

On the 26th of August, after the arrival of the ships at New York, Mr. Clyde, the president of the Pacific Mail Steamship Co., called on the agents of the Atlas Steamship Company, the owners of the Etna, and asked them to fix a

The Steamship Colon and her Cargo.

sum for the service, as he desired to transfer the cargo and passengers of the Colon. No agreement was come to, nor any definite proposition made, but the same day the agents of the Atlas Company wrote to Mr. Clyde: "After conversation with Capt. Sanson, we find the matter of importance, and will require consideration; but on Monday, we hope to communicate definitely regarding the salvage of the steamship Colon." The transfer of the passengers and cargo of the Colon to the Crescent City, another steamship of the same line, was immediately commenced. On Monday, August 28th, the agents of the Atlas Company called upon Mr. Clyde. They stated to him that they should claim \$150,000 at least; that that was their view of what the service was worth. Mr. Clyde replied that his views differed entirely from theirs; that he regarded it as a towage service only; that he thought it was not worth anything like that sum, that he would pay a fair compensation for it as a towage service. This was the substance of the conversation. And the interview ended without any definite proposition on the part of Mr. Clyde, and without any arrangement for further negotiation. Mr. Clyde had informed the agents of the Atlas Company, on the 26th, that the transfer of the cargo to the Crescent City would go on without delay, unless they interposed to stop it. On the 29th of August the Atlas Company filed their libel and attached the Colon and her cargo, thereby stopping the further transshipment of the cargo. They claimed in the libel \$150,000 for a salvage service, and there was some delay in procuring the necessary bonds for the release of the ship and cargo, so that the Crescent City, which would regularly have sailed on the 29th, was delayed until the bonds were furnished. The libellants knew that the cargo was being transferred, and that, if not stopped, the

The Steamship Colon and her Cargo.

Crescent City would leave port with it on Tuesday, the 29th, at noon.

The weight of testimony is that the part of the sea where the Colon's machinery became disabled, is not very much frequented by vessels, the vessels passing there being mostly small sailing vessels going between New York and the West India ports, by way of Crooked Island passage, and certainly that the Etna and the Acapulco were the only vessels capable of helping her to proceed on her voyage, which were likely to come near enough to assist her; and as to the Acapulco, the chance of her falling in with the Colon was subject to several contingencies. The current at that time and place was setting to the eastward, and before the Acapulco reached that part of her voyage, the Colon might have drifted so far to the eastward as not to be made from her. Although the master of the Colon believed he could have kept upon the track of the Acapulco, yet his success in doing so would depend greatly on the wind and weather. The drift to the eastward was about a knot and a half while she was attempting to wear. If she were lying to, it would, of course, be much less, and this easterly drift of the current was unusual at that place. The preponderance of the evidence also clearly is, that the Colon, by the aid of her sails alone, could be navigated at sea without danger, except on a lee shore; that with her screw disconnected she would make headway under canvas, with a moderate breeze, and that she could sail under canvas on a wind. Her screw was stationary, that is, it could not be raised out of the water, but could be disconnected from the shaft. The expectation of the master that if necessary he could make the port of New York under canvas, was not an unreasonable one.

It is claimed on the part of the libellants, that the service rendered was a salvage service of great merit; that the

The Steamship Colon and her Cargo.

Colon was rescued from great and imminent perils by the Etna ; that the Etna encountered great risks and incurred great expense and loss in rendering the service, and it was insisted upon the trial that the libellants were entitled to \$150,000. That the service rendered is one that ranks as salvage, and not as a mere towage service, was conceded by the learned counsel for the Colon ; but it is insisted that the alleged dangers to which the Colon was exposed, and those which the Etna encountered in aiding her, are mostly imaginary and that the expense and loss claimed to have been incurred and suffered are greatly exaggerated.

The first danger to which the Colon is claimed to have been exposed was from the condition of her machinery. By the breaking of the columns supporting the cylinders, great masses of iron, it is said, were left unsecured in the ship which in case of a storm might have shifted and rolled about and sunk the ship. The evidence is not very clear or satisfactory as to whether by the rolling of the ship the broken parts of the machinery would have endangered her safety, or to what extent this was so, or within what time this danger could have been guarded against, or what if any precautions could have been taken, in case of the sea rising, to secure these dangerous parts of the machinery temporarily. This particular danger was not referred to in the libel, nor does it appear to have been referred to in the conversation between the masters of the two ships on board the Etna. The only evidence from which it can be inferred, is the nature of the breakage as before described, and the testimony of Captain Griffin, who said that it would take but an hour or an hour and a half to disconnect the screw and yet that he did not disconnect it till the night of the 22d, although it offered a considerable impediment to the progress of the ships while connected. And he gave as the reason for not disconnecting it sooner, that the men were

•

The Steamship Colon and her Cargo.

at work securing the engine ; that that was a most important thing to do at that time ; that the heavy parts of the engine were adrift. From this evidence and from the nature of the damage it may I think be reasonably inferred that the ship was in some danger from this cause during the two days and some hours, and that the work was so important that the men in the engineer's department could not be spared to uncouple the screw, but this element of danger would be entitled to greater consideration if the libellants had shown more fully, by testimony, its nature, extent and duration. It is consistent with Capt. Griffin's testimony that his apprehension of the effect of the existing state of the machinery in case of a storm, may not have extended so far as the actual sinking of the ship thereby, and it is noticeable that while he was in company, on the 20th, both with the Etna and the French brig, there is no evidence that this danger to the lives of his passengers was referred to in either case as a reason for their lying by him, and that, while the master of the French brig offered to do all in his power, Capt. Griffin made no request that she should lie by him till this danger was passed. It does appear by the evidence that that part of the ocean is occasionally visited in July, August and September by hurricanes or circular storms lasting for about twelve hours.

But the Colon was not rescued from this danger, assuming it to have existed, by anything which the Etna did. The Etna furnished no men, nor was she asked to furnish any men, to aid in securing the machinery. Nor could she, if the bad weather had come before the machinery was secured, have saved the Colon or her cargo from this danger. The most she could have done would have been to stay by her and take off her passengers and crew. Her presence was undoubtedly a security to the lives of those on board the Colon

The Steamship Colon and her Cargo.

against this somewhat remote, but on the evidence possible, danger.

The next danger to the Colon relied on arises from her location in a part of the sea little frequented by steamers and where, as is insisted, she would have certainly drifted to the eastward, out of the track of such ships as were likely to pass that way. This, however, appears to be an imaginary rather than a real danger. The infrequent chances she would have in those waters to find a suitable vessel to tow her, of course increased the chances of detention at sea, and so may be said to have enhanced the value to her of the Etna's service ; but she was in no danger at sea, and she was not so far from port and from the other routes of ocean steamers as to be in any sense lost or beyond the reach of help, if she found it impossible for want of favoring winds to make her port. She was tight and staunch and navigable at sea, and could have made some port, and she was well provided with boats, which she could have sent to some port or ports from which aid could be obtained. The prevailing winds of that season in that part of the sea are shown to be light and variable, and, if she had missed the Etna and the Acapulco, she simply would have run the risk, so far as her location is concerned, of being kept longer at sea and of being compelled to make or approach New York under canvas. She could hardly have failed, in approaching New York, to have fallen in with some steamer which could have towed her in.

The next danger insisted on is, that she was unmanageable under canvas on a lee shore. This also is mostly an imaginary danger. It is true, doubtless, that these long steamers are far less manageable under canvas on a lee shore than sailing ships. Generally they cannot tack, and in bad weather in that position are in greater peril, and they cannot sail by the wind as other vessels can, so that if they are caught with a

The Steamship Colon and her Cargo.

heavy gale on a lee shore, with disabled machinery and not on soundings affording anchorage, they are in great peril; but the Colon was not in this position and in no danger of getting into such a position. If she had not been taken in tow but had proceeded under canvas, she would not have been on a lee shore until near the port of New York and the chances of her being caught there with a heavy gale blowing on shore were certainly very remote, and the chances of her being lost by this danger without possibility of anchorage or rescue altogether too remote to enter into the calculation of the value of this service. At the same time it is of course to have due weight in valuing the service rendered that the Colon was not as manageable as a sailing vessel, that her canvas was designed to aid her steam power and not to propel her independently of it. It is also claimed that the Colon was in danger of getting out of provisions, but this not sustained by the evidence.

In fact, the principal value to the Colon of the service rendered by the Etna was that her passengers and her cargo, which were bound for Colon, were brought to New York at least nine days and perhaps a much longer time sooner than they would have reached that port but for the assistance so rendered; but that she was in any great or impending peril from which the Etna rescued her or her cargo, or in any danger, tending in any considerable degree to increase the value of the service of bringing her promptly into port, is not established by the proofs.

But with all these deductions from the extreme claim of the Etna, the service thus rendered to the Colon and her cargo, of being thus promptly towed into port, was a salvage service of great value, and its value is not diminished by the fact that the shippers of cargo by the Colon may have had no claim for damage growing out of the breakage of the machine-

The Steamship Colon and her Cargo.

ry. The amount and value of the property rescued is not changed by this fact.

The risks run by the Etna have also been greatly exaggerated. She had taken on board at Kingston seventy-five tons of extra coal as ballast. Of this she used in getting to New York only twenty tons, leaving her about four days supply on her arrival. She was therefore in no appreciable danger of exhausting her fuel. The supposed danger of collision with the Colon while towing her is too remote to be worth considering. It could arise only from bad management. It is a bare possibility of danger merely which exists in all towage services. It appears that there was some insurance on the Etna, but how much does not appear. The policies are not produced. In view of the non-production of the policies it would seem that the libellants have failed to prove a possible loss of insurance by deviation in towing the Colon, since it is a common provision in policies of insurance to permit the rescue of vessels in distress. The burden here is on the libellants, and the evidence is exclusively within their own control. The danger to the Etna chiefly relied on was that by the extra strain put upon her machinery it was in danger of becoming disabled. The attempt, however, to prove by the witnesses Petrie and Roberts, that her machinery was unduly strained and in fact injured by towing the Colon, failed; and upon the whole evidence I should not be justified in finding that she incurred any appreciable danger of disabling her machinery from the service rendered. And it is admitted by the master of the Etna, that the towing of the Colon imposed very little extra labor on the crew of the Etna. The Etna presents a bill of expense and damage amounting to \$2340.65, besides the claim of \$2500 for loss of freight on the next trip, which last item, however, was abandoned on the trial after considerable testimony had been

The Steamship Colon and her Cargo.

taken on the subject. Of this claim for damages, the testimony sustains but a small part. The claim of \$600 for a new shaft is clearly not proved. Long afterwards and after one or more intervening voyages, a new shaft was put in, but it is not shown that the necessity for it was caused by the extra work done on this voyage. Seventy-five dollars for injury to hawser, \$100 for repairs to the deck, \$200 for extra work on the engine, \$125 for extra coal used will more than cover all damages and expense proved to have been incurred by the Etna. The sum of \$484, claimed as paid in fines for detention of the mails, was not shown to have been paid. The engineer's log does not sustain the claim that after taking the Colon in tow the Etna was run under any increased pressure of steam or with any considerably increased consumption of fuel, and the entries in the log indicating greater trouble from heating of the machinery were shown to have been interpolated pending the trial.

While it is properly conceded by the learned counsel for the claimants that the service rendered is to be treated as a salvage service and not merely as a towage service, and is to be compensated accordingly, yet it is very manifest that it was for the most part wanting in those elements of danger, both to the property saved and to that rendering the salvage service, which have led to the giving of a large part of the value of the property saved. The rule as to the compensation is perhaps stated with as much certainty, by Sir John Nicholl in the case of *The Clifton*, 3 *Haggard* 118, as the subject admits of, as follows: "The ingredients of a salvage service are : *First*. Enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow subjects. *Secondly*. The degree of danger and distress from which the property is rescued,

The Steamship Colon and her Cargo.

whether it were in imminent peril and almost certainly lost if not at the time rescued, preserved. *Thirdly*. The degree of labor and skill which the salvors incur and display and the time occupied. *Lastly*. The value. Where all these circumstances concur, a large and liberal reward ought to be given, but where none or scarcely any take place, the compensation can hardly be denominated a salvage compensation; it is little more than a mere remuneration *pro opere et labore*."

It is unnecessary to discuss in detail the recent cases of salvage where the service rendered consisted of towing a disabled steamer into port, which serve in some sort as precedents and guides to the court in fixing the amount of the compensation. No two cases are exactly alike. The cases most nearly like this, though each of them differing from it in important particulars are: *The City of Berlin*, 37 *Law Times* 307; *Pacific Mail SS. Co. v. Ten Bales of Gunny Bags*, 3 *Samyer* 187; *The Herman Ludwig*, *Vice Admiralty Court of Nova Scotia*, unreported; *The Saragossa*, 1 *Ben.* 551, 553; *The Rebecca Clyde*, 5 *Benedict* 98; *The Emily B. Souder*, 7 *Ben.* 550. The case of *The Amerique*, *L. R. 6 P. C. App.*, being a case of derelict, has little analogy to the present.

The principle is, that the compensation should be such that it will offer a proper inducement to the rendering of these extraordinary services at sea, and yet not so great that it will deter the parties in need of aid from the acceptance of the service. Taking into account the large number of the Colon's passengers and crew and the value of the two vessels and their cargoes, the distance from port at which the Colon was taken in tow, and the character of that part of the sea as being remote from the usual track of steamers, and the great value to the Colon of the service rendered in bringing her passengers and cargo into New York so quickly, with all the other elements of the question disclosed by the evidence, I think

The Steamship Colon and her Cargo.

that the sum of ten thousand dollars will be a fair and liberal compensation to the Etna and her ship's company for the service rendered, and risks and expenses incurred in the service, out of which is to be paid to the owners of the Etna \$500 for the damage to ship and hawser and for extra coal, and \$750 to the master of the Etna, and one-half of the residue, \$4,375, is also awarded to the owners of the Etna. The other half of the residue is to be apportioned among the officers and crew of the Etna, including the master, in proportion to their wages.

Upon the trial it was agreed that the amount of the claim of the consignees of the part of the cargo of the Etna should be determined by a reference, in case it should be decided that they were entitled to any compensation. Enough appears upon the proofs to show that by the lengthening of the voyage this fruit or some of it, which would otherwise have arrived in New York in sound condition, became damaged or worthless by decay. Two questions arise, *first*, whether the consignees, who are shown to have been the owners of the fruit, are entitled to any compensation, and *secondly*, if entitled to any compensation, on what principle the amount to which they are entitled is to be computed. That they are justly entitled to compensation is, I think, clear. The Colon requested, for her own benefit and the benefit of her cargo, the Etna to tow her into port, and for this purpose to lengthen her voyage two days or two days and a half. If in order to do so it would have been necessary for the crew or the passengers of the two vessels to consume any part of the cargo of the Etna which was eatable as food, no question would probably be made that the Colon must compensate the owner of that part of the cargo for the same, whether the shipper had agreed in that case not to hold the Etna liable for the loss or not. I see no reason why, in the suit of the owners of the Etna for the sal-

The Steamship Colon and her Cargo.

vage, such a claim in such a case should not be included and adjusted. It grows out of the same transaction and is immediately connected with the service rendered, and the Etna as carrier, though absolved from liability, would still have been bailee of the property, with all other rights, duties and obligations of such bailee and carrier. So if it became necessary for the salving ship to throw overboard part of her cargo in order to render the service, the justice of the case would be the same, even though the ship were protected by a similar stipulation in the bill of lading. Now, instead of consuming the fruit or throwing it overboard at the request and for the benefit of the Colon, the Etna kept it at sea two days longer than it would otherwise have been kept at sea, and thereby its value was lessened. It is just as truly sacrificed at the request of and for the benefit of the Colon in this case, to the extent of the loss in value suffered, as it would have been if consumed or thrown overboard ; and the fact that the fruit was shipped under bills of lading, permitting the Etna to take other vessels in tow, does not affect the question, except that in the one case the ship would be entitled to the damages because liable over to the shipper, and in the other case the shipper would himself be entitled to them. The bill of lading was a waiver of all claim of damage arising from this cause to the consignee as against the *Etna*, and as against her and her owners *alone*. The stipulation was not made for the benefit of other vessels, except so far as permitting the Etna to rescue them may be necessarily a benefit. Releasing such other vessel from such liability was not within the purview of the contract so made between ship and shipper. That stipulation was therefore no waiver of any claim for damages which the consignees or shippers might have against another vessel at whose request and for whose benefit their property might be with their consent taken or sacrificed. Nor would this clause in the

The Steamship Colon and her Cargo.

bill of lading disable the Etna, as a carrier of the consignee's goods, to claim and recover such damages in this suit. Here, however, the consignees have joined as co-libellants, and by the course taken on the trial, their claim has been severed from that of the ship, their carrier. It will be observed that this is a claim for damage growing out of the salvage, not for salvage compensation properly so called, and there is nothing in the cases cited by the claimants' counsel which prevents the allowance of such a claim. While those cases establish the general proposition that cargo of the salving ship is not entitled to share in the salvage, yet they do not deny but recognize the right of the salving ship, being liable over to the shipper, to recover the resulting damage to cargo as one element of the salvage award, unless the ship has been released from this liability to the shipper; and, if the shipper has so released the ship, they also recognize the right of the shipper to recover what the ship would otherwise have recovered on that account. (*The Nathaniel Hooper*, 3 Sumn. 581.)

The only remaining question is as to the rule of damages to be applied to this case. It is insisted by the claimants that the ordinary rule of damages in case of damage to property lost or destroyed at sea, should be applied in this case; that according to that rule the amount of damage, recoverable for that part of the fruit which became worthless, is its cost in Jamaica, with the expense to the owner of shipping it and getting it to the place where it was lost. It is true that this rule of damage is firmly established in cases of property lost or destroyed *before it reaches port*. It is held that the value it would have had if it had reached port in safety, cannot be considered in determining its value at the place of loss, because it is a mere possibility that it would have ever reached port, even if it had not been lost as it was lost. The rule has been adopted as excluding merely speculative profits, and as

The Steamship Colon and her Cargo.

furnishing a convenient and in its general application a fair measure of the value of property lost or destroyed at sea. But there is no reason for applying the rule in this case. The goods *did* arrive. They were *not* lost at sea. The question is, what damage the owner has sustained by receiving them in the condition, in which they were delivered on the day of their arrival, instead of in the condition they were in on the day when they would have arrived but for the detention. It is of course a question of fact to be determined whether on Thursday morning, Aug. 24th, they were still sound, and how far they had deteriorated in value when actually delivered. To allow this difference in value to the owners, is not to allow them speculative profits. It is simply to allow them the amount of loss which, at the request and for the benefit of the Colon, the owners have suffered. The rule alluded to has, it is believed, not been applied where goods have arrived, after suffering injury at sea. It has been customary in cases of salvage to make a *liberal* allowance for expense and damages incurred; but independently of that consideration, these consignees are entitled to their damages actually sustained, and it must be referred to a commissioner, if the parties do not agree, to compute the amount on the basis of this opinion.

The interview between Mr. Clyde and the agents of the Atlas Company, on August 28th, disclosed such a total diversity of views as to the claim which is the basis of this suit, that either party may properly have inferred that no further negotiation was desired, unless asked for; and as no suggestion of the kind was made, I think that the immediate bringing of a suit would not have been oppressive, or a ground for withholding costs from the libellants, if the claim made in the libel had not been exorbitant. But the claim was exorbitant, and made in a way which subjected the claimants to unnecessary trouble, expense and annoyance.

In the matter of Demas Barnes.

The amount of security exacted was unnecessarily large. The libellants also subjected the claimants to the expense and trouble of producing evidence and defending against a claim for loss of freight, which was afterwards abandoned, but which the agents of the Etna should have discovered to be unfounded before coming into court. The libellants will therefore recover no costs, except that the costs, as between the consignees of the fruit and the claimants from the time of the order of reference, will abide the event.

Decree accordingly.

For owners of Etna, *E. P. Wheeler* and *C. S. Souther*.

For crew of Etna, *W. R. Beebe*.

For shippers of cargo by Etna, *S. H. Olin* and *J. H. Montgomery*.

For claimants, *T. E. Stillman*.

AUGUST, 1878.

IN THE MATTER OF DEMAS BARNES.

REMISSION OF FORFEITURE.—ENTRY OF DECREE.

A suit was commenced by the United States against V. & Co., to recover the value of goods alleged to have been entered by them in violation of the 1st section of the Act of Congress, of March 3, 1863. While it was pending, proceedings in bankruptcy were commenced against V. & Co., and B. was appointed assignee. Thereafter the attorney for V. & Co. in that suit withdrew a plea in bar and filed a *cognovit* that judgment be entered,

In the matter of Demas Barnes.

and it was entered accordingly for \$99,951.25. At the first meeting of creditors, the United States District Attorney appeared and filed a proof of debt, setting forth that judgment. The assignee excepted to the proof and on the matter being certified to the court, it was held that the claim was provable in bankruptcy, on the basis of the facts out of which the liability arose. The matter was referred to the Register to take proof of the validity and amount of the claim. He reported, and on the 18th of August, 1874, the judge decided, that the United States was entitled to prove for the amount of the claim. No formal order to that effect was signed by the judge, but a minute to that effect was endorsed by him on the papers, and from that decision the assignee appealed to the Circuit Court, which affirmed the decision. The assignee then filed a petition for remission, and an order was made, referring it to a commissioner to inquire as to the facts of the case. After this order a formal order was entered *nunc pro tunc*, in conformity to the minute of the District Judge of August 18th, 1874. The commissioner having made his report, and the same having been certified to the Secretary of the Treasury for decision, and having been by him returned to the commissioner for revision, the United States District Attorney moved for an order dismissing the proceedings on the petition for remission, claiming that it was not competent for the Secretary of the Treasury to give a remission in the case :

Held, That, the court having been informed by the judge, before whom the petition for remission came, and by whom the order of reference to a commissioner was made, that substantially the same ground was then taken by the District Attorney and overruled by the court, that ruling, having been submitted to and never reversed, must be regarded as the settled law of the court, or at any rate, of the case ;

That it made no difference that since that time the order had been entered *nunc pro tunc* on the minute of the judge, of August 18th, 1874 ;

That that minute under the circumstances of this case was to be held to have the same effect as if the order had been then entered on it ;

That the motion to dismiss the petition must be denied.

The District Attorney also moved that the petitioner be compelled to make the record of the case a part of his petition :

Held, That the United States might prove the facts embodied in the record, but that this motion also must be denied.

CHOATE, J. This is a motion to dismiss proceedings brought to procure the remission of penalties claimed to have been incurred by breach of the customs revenue laws.

In the matter of Demas Barnes.

Theodore H. Vetterlein, Bernhard T. Vetterlein and Theodore J. Vetterlein were partners in business, and were adjudicated bankrupts, upon a petition of their creditors, filed December 28th, 1870. Barnes, the petitioner, was appointed their assignee in bankruptcy, March 1, 1871. Prior to the time of the filing of the petition in bankruptcy, suit was commenced in this court against the Vetterleins, to recover the value of goods alleged to have been entered by them at the New York Custom House, in violation of the 1st section of the Act of March 3rd, 1863. At the time of the bankruptcy the suit was at issue and undetermined. After the bankruptcy the attorney for defendants withdrew their plea in bar of the action, and filed a *cognovit* that judgment be entered for the amount of the claim, \$99,951.25. The United States appeared by the District Attorney at the first meeting of creditors and filed proof of the claim, setting forth the judgment as the basis of the claim. Exceptions were filed by the assignee to the proof, on the ground that the claim was not one provable in bankruptcy; but upon the matter being certified to the Judge, he held that the claim was provable in bankruptcy, but not on the basis of the judgment, and that the proof must be on the basis of the facts out of which the liability grew; and on the 22d of June, 1872, the matter was referred to the Register to take proof of the validity and amount of the claim, and to report the evidence to the court. The Register reported and the Judge of this court decided on the 18th of August, 1874, that the United States was entitled to prove for the amount of the claim. No formal order to that effect was signed by the Judge, but a minute to that effect was endorsed by him on the papers. From this decision the assignee appealed to the Circuit Court, and, after argument, Mr. Justice Hunt affirmed the decision. On the 25th of August, 1875, the assignee

In the matter of Demas Barnes.

filed his petition for remission ; and upon notice to the District Attorney, and after hearing thereon, the District Judge made an order referring it to a commissioner to make summary inquiry into the circumstances of the case.

After this hearing before the judge and this order of reference, a formal order was entered *nunc pro tunc* as of April 20, 1872, the date of the original proof of debt, in conformity with the decision of the District Judge, of August 18, 1874, and the affirmance thereof by the Circuit Justice.

The commissioner having made his report, and the same having been certified to the Secretary of the Treasury for decision, the case has by stipulation been returned by the Secretary to the commissioner for a revision of his findings of fact on the evidence already taken, subject to the right of appeal to the District Judge, if any such right of appeal exists. And the case being thus again before the commissioner, this motion is made by the District Attorney.

The point made by the District Attorney is, that it is not competent under the Acts of Congress for the Secretary to remit a forfeiture after an adjudication by a court of competent jurisdiction, which necessarily involves a finding of fact against the defendants, that the penalty was incurred by them with actual intent to defraud the United States and not without such intent or gross negligence ; that the decision of the District Judge that the penalty was incurred necessarily involves, under the act of March 3d, 1863, a finding that they did the acts complained of with this guilty intent, since by the terms of that act, the wrongful entry of the goods must be made "*knowingly*" by the parties complained of. It is also claimed by the District Attorney, that upon this question the United States is not concluded by the order of reference made Sept. 24, 1875, as a determination of the question of jurisdiction, since at that time no formal order had been

In the matter of Demas Barnes.

entered in conformity to the judge's decision, 'declaring the debt due and subject to proof; that therefore there was at that time no *adjudication* of the guilty intent, and the question of jurisdiction now raised could not then arise. He also insists that the question of jurisdiction is always open and even if the point could then have been taken, that a motion to dismiss for want of jurisdiction is proper at any stage of the proceedings.

As to the question whether when the petition was first before the District Judge, there had been a judicial determination or judgment upon the question of the intent, so far as the finding of the intent is necessarily involved in the judgment that the debt was due and provable, I am of opinion that the parties to this proceeding are estopped to deny that there was such a judgment. While it is true that as matter of practice it is customary in this court, following the analogy of the practice in the courts of the State of New York, always to enter a formal order to be signed by the judge, yet in other jurisdictions and in many of the States of the Union, the mode of entering a judgment or order of the court is to have a brief memorandum of the same minuted on the papers or on a docket by the clerk by the judge's direction, and this is deemed to be and treated as the record of the judgment or order of the court, until an extended record of the same is made by the clerk, often long afterwards, the minute so made serving as a sufficient basis for the issue of execution or other proceeding subsequent to judgment. I should hesitate, therefore, notwithstanding the practice that prevails, to hold that a minute on the papers by the judge, containing in itself the very substance of the order subsequently entered, was not to be deemed a judgment or order in the sense now in question. But, however this may be, both of these parties have in their dealings with each other and with the court assumed the existence

In the matter of Demas Barnes.

of such a judgment or decision. The petition for remission recites such a "*decision*" by the District Judge. The appeal from the decision by the assignee alleged such a decision as the basis of an appeal. The United States appeared and argued the appeal on the merits and procured its affirmance, thereby reasserting the existence of the judgment appealed from. The court must have been led to assume the existence of the judgment, and the entry of the order finally *nunc pro tunc* after the irregularity of practice was discovered, was made to conform the record to the fact as all parties had up to that time assumed it to be. It would be clearly improper, therefore, to allow either party any benefit from the fact that no formal order had been entered when the petition of remission was first before the court.

I am informed by his honor Judge Blatchford, before whom that petition came, that the point was then made by the District Attorney that this was not a case in which it was competent for the Secretary of the Treasury to remit the forfeiture, substantially on the ground now taken by the District Attorney, but that the court refused to hear argument of the question, on the ground, as then stated orally to the counsel, that although the intervention of the District Judge at some stages of the case is made necessary by the statute, yet that the design of the statute was to make the Secretary of the Treasury the real judge in the case as well upon the merits as upon any question of jurisdiction that might arise, and that therefore it was not proper, unless in a case of want of jurisdiction so clear as not to admit of argument, for the District Judge to deprive the Secretary of his power to decide the case by refusing to entertain the petition or to certify the case for decision, by a determination against the jurisdiction. To assume such power to dismiss the petition, without any right of appeal to the Secretary on that question, would virtually oust

In the matter of Demas Barnes.

the Secretary of the jurisdiction to determine the cause given him by the act of Congress. (a)

This ruling was submitted to and has never been reversed. It must be regarded as the settled law of this court, or, at any rate, as the settled law of this case. The motion to dismiss is therefore denied.

The District Attorney also moves that the petitioner be compelled to make the record of the case which resulted in the decision that the debt was due and provable, including the testimony taken in that proceeding, a part of his petition, or, in default thereof, that the petition be dismissed. This motion must also be denied. It is true that the petitioner should set forth all the circumstances of the case in his petition. But if this record and the decision made upon this testimony are to be regarded as "circumstances" within the meaning of the statute, which is at least doubtful, yet, in case of a failure to set forth in the petition all the circumstances, the United States may prove them as facts and so have the full benefit of them; and if the petition is so defective as to call for the interference of the court to compel a fuller statement, the application must be made much more promptly than it has been made in this case. For these and other reasons, this motion is denied.

For the United States, *Roger M. Sherman*, Assistant District Attorney.

For assignee, *Henry T. Wing*.

(a) See *Galley v. U. S.*, 1 Brock. 439.

YORK.

Timber.

York.

STICKS OF

OF ACTION IN REM

to recover freight and
loading. The consignee of
interest in it, intervened and
for the process. The cargo
party of any claim of lien for
agreement agreeing to pay
admitted that he was
the amount claimed by
to be paid on the cargo,
such "per M. inch board

been lost;

pendent before the court,
the court would turn the
a decree against him for
charter, and the \$100 de-
at interest or costs;
lumber carried was to pay
ends were not square.

brought from Port
charter party, and a bill
lumber, amounting to
lumber, at \$7.50 per
for M. freight for the

One Hundred and Eighteen Sticks of Timber.

plank and lumber. On arrival the master informed the consignee that there was a claim of \$150 for demurrage at Port Royal, and requested an advance on the freight. The consignee advanced \$500, and also signed the following agreement :

“NEW YORK, Oct. 9, 1876.

“I hereby agree to become responsible to the captain and owners of Schr. A. G. Ireland, to the amount of \$150, and to retain all the balance in my hands rec'd from sale of said schr's. cargo after freight, com's., &c. are paid, subject to an attachment for demurrage.”

And a further advance of \$150 was also made, and the cargo was discharged. The inspector who measured the 188 sticks of timber reported 160,212 feet measurement ; and the consignee offered to pay freight at the rate of \$7.50 for that amount, and for the rest of the cargo at the rate and measure in the bill of lading, less the \$650 advanced, but refused to pay demurrage. The cargo has been sold by the consignee and was taken away by the buyer as fast as discharged. The master libelled the cargo on the charter party for his freight and demurrage, and the consignee appeared as claimant of the cargo, and gave a stipulation for its value.

BENEDICT, J. This action is brought to enforce a lien against a cargo of timber, for freight and demurrage, due upon a charter party. The existence of the lien is denied by the claimants. The evidence shows that after the cargo arrived at the port of delivery, it was sold by the person to whom it had been consigned and who is the claimant in this action. After this sale had been effected, the timber was discharged from the vessel, and as fast as landed it was taken by the buyer and removed to his premises, where, in

point of fact, a part of it had already been sawed when the libel herein was filed.

It further appears that the master and a part owner of the vessel were informed before the cargo was landed of the consignee's intention to sell the timber, and promised not to give the buyer notice of any claim upon it, lest thereby the sale should be broken up.

It still further appears that an agreement was come to between the master and owner of the vessel and the consignee of the cargo as to the amount of the demurrage due, in which agreement not only was there no mention of an intention to claim a lien upon the cargo, but a sale of the cargo and a receipt of the proceeds by the consignee was plainly contemplated.

These significant facts are inconsistent with the idea that it was intended to look to the cargo after its landing for either freight or demurrage. The only evidence pointing to an opposite conclusion is that respecting the remark made at the close of the interview at which the agreement as to the demurrage was made. This conversation is denied by the consignee, but if it occurred as claimed by the libellant, it is not inconsistent with the fact, clearly proved, that the intention of the master and owner was to permit the consignee to sell the cargo and receive the proceeds and to withhold from the buyer the fact that the freight and demurrage had not been paid. A delivery of cargo by the vessel to a third party who has purchased the same and agreed to pay the consignee therefor, with the knowledge of the shipmaster, who has intentionally withheld from the buyer information of any intention to hold the cargo for the freight, in case the freight should not be paid by the consignee, amounts to a waiver of the lien for freight.

One Hundred and Eighteen Sticks of Timber.

I am therefore of the opinion that the libellant has now no lien for freight upon the cargo proceeded against. But in this case, it appears from the record, that the party before the court, as claimant of the cargo, is not the person who purchased the timber, and to whom it was delivered from the vessel, but the consignee—who, as now appears, had no interest in the cargo at the time it was seized, but who has here intervened without objection taken by the libellants, and has filed his own stipulation for value—so that any decree rendered in this cause must, of necessity, be made against the consignee. The party thus before the court was knowing to all the facts attending the carriage and delivery of the cargo, and in his answer admits himself to be liable for the freight due upon the charter party. The question, then, is presented whether it is not permissible in a court of admiralty to treat this action as an action *in personam* against the person whose stipulation is in court, and give a decree accordingly. There is no possibility of any injustice being done by such a course.

The issue raised by the pleadings presented every question that can be raised in respect to the liability of the claimant, and one additional question, viz.: that of a lien. The fact that the claimant was the consignee of the cargo, who received and sold the same, and now has of the proceeds an amount equal to the freight and demurrage, appears by the testimony of the consignee himself; and in addition to the admission of liability in the answer, the evidence tendered in support of the libel proves every fact upon which the liability of the claimant depends, nor is there any pretence that any other or different state of facts can be shown.

Inasmuch, therefore, as the pleadings involve the question of the claimant's liability and as a decree in favor of the libellant in this action will be, in substance, a decree against

the claimant, for a liability admitted by his answer, it would seem to be not only just, but in harmony with the principles upon which proceedings in admiralty are conducted, to disregard the form of the proceeding, and instead of remitting these parties to an action *in personam*, where precisely the same facts would appear, to determine in this action the question which the pleadings present, viz.: the amount of freight due the libellant, and give a decree for that amount, against the consignee, who has volunteered to intervene in this action, and has obtained the release of the cargo by giving his own stipulation for its value. It is not supposed that such a course could be pursued if the owner of the timber was before the court as claimant. Nor could it be adopted as against this claimant if the result would necessarily be to charge him with the costs, for it would be unjust to saddle the costs of the action upon the party who succeeds upon a question decisive of the right of the libellant to institute the action in the form adopted. But in admiralty, costs are in the discretion of the court, and, as a matter of course, no costs will be given to the libellant. I should even give costs to the claimant, were it not for the fact that his appearance as claimant, contesting the libellant's demand, was wholly gratuitous, as at the time of filing the libel he had no interest whatever in the property proceeded against.

I am not aware of any adjudged case in which a course similar to the one above indicated has been pursued; but cases will, I think, be found tending to support such action on the part of the court. See *Sheppard v. Taylor* (5 Pet. 701) for a case where an action *in personam* was turned into an action *in rem*.

I proceed, therefore, to determine the amount of freight owing by the claimant to the libellant, upon the facts proved. It may be first observed that the position of the claimant is

One Hundred and Eighteen Sticks of Timber.

not that of one who has advanced money upon a clean bill of lading, for, as clearly appears, when the claimant made his advance he knew that the cargo was being transported under a charter party and had made himself acquainted with the terms of that instrument. No doubt can therefore be entertained as to his liability to pay the freight due, according to the charter party. Indeed, he admits his liability in the answer he has filed.

But a single question has been raised as to the amount of freight due. The consignee disputes the method by which the timber was measured by the libellant, for the purpose of calculating the freight.

The provision of the charter is that the freight shall be \$7 and \$7.50 "per M., inch board measure." The consignee has contended that the meaning of this provision is that the freight is to be calculated upon a sale-inspection measurement, in which all broken, unsound and unmarketable parts are excluded from the measurement. To this view I cannot accede. The meaning of the charter is that all the timber carried is to pay freight, excepting only the butts of sticks whose ends are not square. So the timber was measured by the witness Armstrong, as I understand his testimony, and a decree will therefore be entered for freight, calculating it at the rates named in the charter party, upon the quantity given by the witness referred to, unless the claimant desires to institute a more particular inquiry as to the quantity when measured in the manner indicated. There is a possibility that the witness may have been misunderstood, and permission is therefore given to the claimant to institute such inquiry if he so desires.

Thus far I have confined my attention to the question of freight alone. The libel also claims demurrage at the rate named in the charter party for detention of the vessel while loading.

The International Grain Ceiling Co. v. Herman Dill *et al.*

Upon this question the claimant has set up in his answer and proved an agreement on his part to be personally responsible for demurrage to the amount of \$150. I entertain no doubt of the personal liability of the consignee for this amount upon the agreement which he entered into, and having himself set up and proved the agreement, no injustice will be done by rendering a decree against him in this action for that amount of demurrage as well as the freight, less the payments made on account. I allow no interest and, for the reasons above stated, no costs to either party.

Let a decree be entered in accordance with this opinion.

For libellant, *D. and T. McMahon.*

For claimant, *John E. Risley.*

Southern District of New York.

SEPTEMBER, 1878.

THE INTERNATIONAL GRAIN CEILING CO. v. HERMAN DILL ET AL.

PRACTICE.—SETTING ASIDE ATTACHMENT.—BOND TO MARSHAL.—ESTOPPEL.—
FALSE RETURN.

A libel having been filed against D. and R. which averred that "the respondents are in this district or have goods, etc., to wit: the ship *Swallow*," process was issued against D. and R. with a clause of foreign attachment. D. and R. resided out of the district, but had a regular and well-known place

The International Grain Ceiling Co. v. Herman Dill *et al.*

of business within the district, and were usually to be found there during business hours, every day. The marshal made no attempt to find them. He returned to the process that the respondents were "not found" and that he had attached their right, title and interest in the ship. On the return of the process D. and R. failed to appear, their default was taken and a reference ordered. H. and C. claiming to own the ship, finding that she was in custody of the marshal, gave a bond under the act and the vessel was released. They then moved to compel the marshal to amend his return, and to vacate the attachment and have the bond cancelled. In opposition to the motion, the libellants produced affidavits tending to show that D. and R. under a contract to purchase the ship, had paid a large part of the price, but had not got title to her, and that the debt was due and that D. and R. did not desire to have the motion granted :

Held, That the marshal's return that the respondents were "not found" was a false return; that H. and C. were so interested as to be entitled to make this motion, and were not estopped from making it by having given the bond, and that as there was no dispute about the facts the court could give the relief asked on motion as well as in an action against the marshal for a false return ;

That the marshal must be directed to amend his return by striking out the words "the within respondents not found," that the attachment must be vacated and the bond cancelled, and all proceedings subsequent to the issue and return of process must be set aside.

CHOATE, J. This is a libel *in personam* against Dill and Radman to recover \$2986, for material furnished to various vessels. The libel alleged that "the respondents are in this district or have goods, etc., to wit, the ship Swallow," and it prayed process with attachment. The process issued required the marshal "to cite and admonish the said respondents if they shall be found in your district to appear, etc., and if the said respondents cannot be found, that you attach their goods and chattels to the amount sued for, and if such property cannot be found that you attach their credits and effects, etc."

On the return day of the process, May 21, 1878, the marshal made return as follows : "The within respondents not found. In obedience to the within process on the 17th day

of May inst. on board the ship *Swallow*, lying, etc., attached the goods and chattels of the within named respondents, to wit: their right title and interest in the said ship, by delivering to and leaving with Peter Longwood, the first officer and person in charge of said ship, a copy of said process and at the same time exhibited to him the within original, not knowing the extent of their interest."

The respondents not appearing, their default was taken and a reference ordered to compute the amount due. The marshal having put a keeper on board to maintain his attachment, the petitioners Howes and Crowell, claiming to own the ship, finding that she was in the custody of the marshal, on the 25th of May, gave bond under the act of March 3, 1847 (Rev. Stat. § 941), with the petitioners Poillon and Brown, as obligors, conditioned "to abide by and perform the decree of the court." The bond recites the filing of the libel, erroneously stated to be on the 24th of May, and the attachment and the custody of the marshal. Thereupon the vessel was delivered to the claimants. The claimants and their sureties on the bond now move to compel the marshal to amend his return and to vacate the attachment and to have the bond cancelled and to have the libel dismissed on the following facts, which are not disputed. The respondents Dill and Radman reside in the Eastern District of New York, but carry on business in the city of New York, where they have a regular and long established place of business as merchants, their names and business address being in the City Directory, and they are usually to be found at their place of business every day during business hours. The marshal made no effort whatever to find the respondents or either of them before attaching the vessel.

The libellants and the marshal having notice of this motion appear, but do not contest these facts, nor is it disputed

The International Grain Ceiling Co. v. Herman Dill *et al.*

that Howes and Crowell are the owners of the vessel. Affidavits in opposition to the motion are produced, tending to show that Dill and Radman under a contract to purchase the vessel have paid a large part of the price, and it is claimed that they had an attachable interest in the vessel. The affidavit of the respondents Dill and Radman is also produced, that the debt sued for is justly due and that they do not join in or desire the granting of this motion.

The marshal's return "not found" is clearly a false return. The abbreviated form of return which usage sanctions imports that the respondents were not found within the meaning of his precept, that is, after proper effort to find them in the due execution of his precept.

The form of the process and the long established rule of the court prescribing that form clearly show that there can be no valid attachment in default of personal service of process in a suit in admiralty *in personam*, except in case the defendant cannot be found within the district. This principle is abundantly recognized also in the authorities. (Admiralty Rule 2; *Cushing v. Luird*, 4 Ben. 70 ; 2 Parsons, Ship. and Admiralty 390 ; Benedict's Admiralty (2d Ed.) 426.) Mr. Benedict in his treatise says : " Under such a process [capias with clause of attachment] it is the duty of the marshal to arrest the party if he can be found in his district, and he has no right to attach goods, chattels, debts or effects before he has endeavored to find the party himself." (§426.) This is unquestionably the law. (See also *Harris v. Hardman*, 14 How. 334.) The only difference in the process now in use and that referred to by Mr. Benedict above is, that arrest for debt being abolished the precept now directs the marshal to cite the defendant to appear, instead of directing the marshal to arrest him.

It is clear, therefore, that to attach goods without any endeavor to find and serve personally the defendants when they are to be found within the district, is an abuse of the process of the court, and the facts being clearly shown or admitted, such an attachment cannot be sustained.

Cases may arise raising the question what amount of diligence the marshal must use in endeavoring to find the defendants, or what circumstances in fact will justify him in returning "the defendants not found," but the present case is free from all such question, since upon the undisputed facts the defendants were to be found within the district without any difficulty and there was no attempt to serve them.

It is insisted, however, on behalf of the libellants, that if the return is false, these petitioners have no such standing in court or relation to the cause that they can make this motion; that the respondents alone could have this relief and that they do not ask it and being in default are not entitled to ask it. There is no ground for this claim. These petitioners are directly interested in the result of the suit. Under the act of 1847 judgment may in this very suit be ultimately entered against them. Besides that, they are interested in the property attached and are the parties injured by the abuse of the process of the court. It would be very singular if the court could not relieve them, that abuse being admitted. It is also claimed that the return of the marshal is conclusive, and that the only remedy is by an action for a false return. Where the alleged falsity of the return involves a question of fact, the party aggrieved should be put to his action for a false return that the question may be properly tried and the right of appeal saved. (*Evans v. Parker*, 20 Wend. 622; *Glover v. Kelsey*, 2 Paige 418.) So also if a doubtful question of law arises on admitted or uncontested facts it should not be determined on motion. But the power of the court in a proper case to com-

pel an amendment of the return of the officer on motion is not denied, but is recognized by the very authorities which hold that an action for a false return is the remedy where the question is doubtful ; and in this case it seems to be wholly unnecessary to remit these parties to their action, because there is no doubt about the facts, nor any doubt that on those facts the return is false. In a clear case the court will on motion or of its own motion set aside proceedings in a cause where they have been without jurisdiction, although in such a case if the jurisdictional question is doubtful the objection should be taken in such form that it may be regularly tried and not determined on affidavits. (*Dennistown v. Draper*, 5 Blatch. Rep. 340.) In such cases it is not a question of the power of the court over its own proceedings or its own officers, but of the proper mode in which that power shall be exercised with a due regard to the rights and interests of the parties.

But it is claimed that the petitioners are estopped by giving the bond to move to vacate the attachment or to deny the truth of the return or the validity of the attachment ; that new rights have intervened in consequence of their giving the bond, which equitably estop them. There is no such estoppel. The libellants have lost no rights by the release of the vessel. They had no attachment, no right in her to lose. The recital of the attachment in the bond does not estop the claimants or their sureties. The libellants have done nothing, nor parted with any value, nor altered their condition on the faith of the claimants' assertion of the fact of the attachment. On the contrary, the recital in the bond is a mere recital of what the libellant has procured to appear to be the fact by his proceedings, that is to say, by the false return which has been made in his behalf. The practice in this case appears to be in effect an ingenious but unwarrantable method of levying execution before getting judgment and a grossly im-

proper extension of the remedy of foreign attachment ; and to hold parties estopped to deny the fact of the attachment, because they have given a bond for the property, the attachment of which they were misled by the libellants or the marshal to believe was in fact made, would encourage and sanction this irregular practice. The attachment being void, the bond necessarily fails and it would be unjust to hold the parties to it, and no technical rules require that they should be held to it. (*Harris v. Hardman*, 14 How. 334.)

It is also objected that a former motion to vacate the attachment virtually decided this, and that, this motion being the renewal of the former motion, could not be made without leave of the court. It is enough to say on these points, that the former motion was based on alleged deceit on the part of the libellants' proctors in procuring the bond to be given, and it was denied on the ground that such deceit was not shown. No motion was then made to compel an amendment of the return and the return was held conclusive as to the time when the attachment was made for the purpose of that motion. This motion is made on an order to show cause, which itself permitted the renewal, if it is a renewal, of the former motion.

These petitioners cannot ask a dismissal of the libel. Notwithstanding the failure to acquire jurisdiction of the defendants or their property on the process already issued, another process may issue on the same libel. The fact that the defendants have an equitable interest or an attachable interest in the ship (if it be so) is immaterial. The claimants as general owners had a right to make their claim and to bond the vessel. The fact that the respondents have made affidavit that they have no defence and desire to make none, is also immaterial. They have not thereby subjected themselves to the jurisdiction of the court, nor become parties to the action. They have not appeared as defendants. No valid attachment

The Bark Archer.

of their property has been made, and their willingness to have the interest of the claimants in this vessel go to pay their own debts, does not affect the claimants' rights in the premises.

An order will be entered directing the marshal to amend his return by striking out the words "The within named respondents not found," and vacating the attachment, cancelling the bond and vacating all proceedings in the cause subsequent to the issue and return of process.

For motion, *Abbott Bros.*

For libellant, *W. R. Beebe.*

For marshal, *Mr. Wakeman.*

SEPTEMBER, 1878. ♦

THE BARK ARCHER.*

PRACTICE.—BONDING PROCEEDS OF VESSEL.

A libel was filed against a vessel on a bottomry bond. The default of all persons was entered except that of a claimant who was in possession at the time of the attachment of the vessel, claiming under mortgages overdue and unpaid. The vessel was sold and the proceeds paid into court. Both parties applied for leave to bond the proceeds. The libellants claimed that evidence already taken by the claimant, if unexplained or uncontradicted, established their right to the amount of their bottomry bond as against the vessel:

Held, That, though, in a clear case, when the rights of the libellant were admitted, the court might permit him to take the money from the registry on

*See *The Bark Archer*, 9 Ben. 455.

The Bark Archer.

giving proper security for its return, such was not this case, the libellants' right being denied in the pleadings, and the court would not prejudge it on a partial production of the evidence.

Motion of the libellants denied and motion of the claimant granted.

CHOATE, J. Upon a libel on a bottomry bond, default having been entered against all persons except the claimants who, at the time of the attachment of the vessel, were in possession, claiming under mortgages overdue and unpaid, the vessel has been sold and the proceeds paid into the registry. The claimants now move for leave to take out of the registry the proceeds, upon giving the customary bond. The libellants also move to be allowed to take out the money on giving bonds, on the ground that the testimony already taken in the cause by the claimants, if unexplained or uncontradicted, establishes the right of the libellants to the amount of their bottomry bond as against the vessel. In a clear case, where the right of the libellant is virtually admitted, he might be permitted to take the proceeds from the registry, giving suitable security for its return; but that is not this case. The right of the libellants is disputed upon the pleadings, and the question can not be prejudged upon a partial production of the testimony. Their motion must therefore be denied. The claimants should be allowed to bond the proceeds, as they would have been entitled to bond the vessel, if still in the custody of the marshal. Their possession of the property has been interrupted by the process of the court to enable the libellants to prove their claim against it, and the same reasons which make it proper that parties from whose possession the vessel is taken should be allowed to bond her, make it also proper and right that they should on the like terms receive the possession of the money into which the vessel has been converted. The system of bonding is intended to mitigate the hardships attendant upon the

The Steamship Alexandria.

seizure of the property, while at the same time affording to parties having claims to assert against it a reasonable security for payment of their claims. Upon the bonding of the proceeds the libellants will have all the security that libellants ordinarily have.

Motion of claimants granted.

For libellants, *T. F. Meyer* and *R. D. Benedict*.

For claimants, *W. W. Goodrich*.

SEPTEMBER, 1878.

THE STEAMSHIP ALEXANDRIA.

COLLISION.—DAMAGES.—INTEREST ON DEMURRAGE.—CUSTODY OF CARGO.

In a collision case the owners of the injured vessel may recover interest on the sum allowed them for the demurrage of their vessel.*

A reasonable sum for the care and custody of cargo is also to be allowed, but not interest on the value of the cargo.

CHOATE, J. Exceptions to the report of a commissioner on the amount of the damages sustained by the libellants in a case of collision. One of the items allowed is demurrage, or an allowance for the loss of the use of the libellants' vessel while being repaired. It was agreed between the parties that the fair rate of demurrage was sixty dollars per

* Contra. *The Eloina*, 4 *Fed. Rep.* 573. And see *The Isaac Newton*, 4 *Blatch.* 22; *The M. M. Caleb*, 10 *id.* 470.

The Steamship Alexandria.

day, making this item \$1,920. The libellants claimed interest on this item, which was refused by the commissioner, to which refusal the libellants except. It seems to me that the libellants are entitled to interest on this item from the date of the commencement of the suit. The item itself is allowed because it is a loss directly caused by the collision, and sustained by the libellants. That loss had been sustained prior to the commencement of the suit. They have been kept out of it since that time by the defence interposed in the suit. Their indemnity obviously will not be complete unless interest is allowed. The case comes within the principle of the case of *The America*, 11 Blatchf. 485. In the case of *Mailer v. Express, &c., Line*, 61 N. Y. 316, it was expressly ruled by the New York Court of Appeals that interest should be allowed on an item of damages of this character. It seems to have been once the rule of the common law that interest will not be allowed on an unliquidated claim for damages, even in cases sounding in the contract, but this rule has been greatly modified. In the case of *Foster v. Goddard*, tried in the Circuit Court of the United States in this district, before Judge Blatchford and a jury, the case being assumpsit for services of a mercantile agent on a *quantum meruit*, the jury were instructed that having found the value of the service, they should add interest from the commencement of the suit. The case went to the Supreme Court, and the judgment was affirmed. This ruling seems not to have been questioned there. (*Goddard v. Foster*, 17 Wall. 123.) The disallowance of interest in the present case is said to be in accordance with the practice in this court; but I am referred to no case where the court has actually passed upon the question. Damages in collision cases in the courts of admiralty are, in general, to be estimated "in the same manner as in other suits of like nature for injuries to

The Tow-boat James McMahon.

personal property." (*The Baltimore*, 8 Wall. 385.) It can not be claimed, therefore, that the disallowance of this claim for interest can rest on any principle as to computing damages peculiar to this court as a court of admiralty. This exception is therefore allowed. The commissioner rightly held the claim for damages, by reason of the prolongation of the subsequent voyage, too remote and speculative to be allowed. He also correctly held upon the testimony that the sum allowed for the care and custody of the cargo was a reasonable compensation therefor. So, also, he properly disallowed the claim for interest on the cargo during its detention. Full damages were allowed for the injury to the cargo with interest.

Libellants' 1st exception sustained, 2d and 3d overruled.
Claimants' exception overruled.

For libellants, *Scudder & Carter* (*G. A. Black*).

For claimants, *H. Nicole*.

Eastern District of New York.

SEPTEMBER, 1878.

THE TOW-BOAT JAMES McMAHON.

PLEADING.—BREACH OF CONTRACT TO TOW.—LIEN.

A libel was filed by the owner of the canal boat M., averring that an agreement was made by her owner with the owner of a tow-boat to tow the M. from New York to Troy for \$15: that the \$15 was paid and the M. was

The Tow-boat James McMahon.

ready at the appointed place to be taken in tow, and that the tow-boat made the voyage but refused to give the M. a place in her tow and neglected to tow her as agreed, whereby damage accrued, for which the tow-boat was sought to be made liable *in rem*. The owner of the tow-boat excepted to the libel, claiming that the facts showed an executory contract, not binding on the tow-boat, and out of a refusal to perform which no lien attaches to the boat :

Held, That the facts set up in the libel constituted a good cause of action *in rem* against the tow-boat.

BENEDICT, J. This case comes before the court upon an exception to the libel, upon the ground that the facts stated do not make out a case of liability on the part of the vessel proceeded against.

The averments of the libel are, in substance, that on a day named, the master and owners of the tow-boat James McMahon made a contract with the owner of the canal boat Mars, wherein it was agreed that the James McMahon, then in the port of New York, should tow the boat Mars, upon a voyage from New York to Troy, for the sum of \$15 towage. That thereupon the owner of the Mars paid to the owner of the James McMahon the towage agreed on, and thereafter the James McMahon entered upon and performed the voyage from New York to Troy, but refused to give the Mars a place in her tow and wholly neglected to tow the Mars as agreed, although the Mars was waiting at the place agreed on and ready to be towed on the voyage in question, whence damage was caused to the owner of the Mars.

These facts, as the claimant contends, make the case one of an executory contract, not binding upon the tow-boat, and out of a refusal to perform which no lien attaches to the tow-boat. In support of the exception, reference is made to the case of the *General Sheridan* (2 Ben. 294).

As I view the case it differs from the case of the *General Sheridan* in several important particulars.

The Tow-boat James McMahon.

First.—In this case the contract was performed so far as the canal boat was concerned. The towage was paid and the boat ready at the appointed place to be taken in tow according to the agreement. *Second.*—The voyage upon which it was agreed the canal boat should be taken in tow was entered upon. The tow-boat, as had been agreed, took a tow from New York to Troy at the time specified, but did not take the Mars in that tow as it had been agreed she should do.

It is not therefore the case of a contract purely executory. When the breach of the contract occurred, the tow-boat was in the act of making the voyage agreed on. The canal boat was awaiting to be taken in tow and the towage had already been paid. I am aware of no authority for holding that in such a case the vessel is not liable for the damages caused by the breach stated.

It will be observed that the contract set forth in the libel was made by the master of the tow-boat, who was also her owner, and, as the libel avers, was in the usual course of the employment in which the tow-boat was then engaged. There is, therefore, no question of want of authority to bind the vessel, as was the case in *Grant v. Norway* (18 Eng. Law and Eq. 561) and in the *Schooner Freeman* (18 How. 182). Neither is this the case of an agreement to make a maritime contract, as was the case of the *Pauline* (1 Bissell 398).

The contract sued on is the maritime contract itself—maritime because it was an agreement to transport a vessel upon navigable waters, and perfected as a contract by the payment and receipt of the towage money. No other payment was to be made, nothing further was to be done by the canal boat and no other contract was contemplated. The liability of the owner was complete. An action *in personam* in the admiralty, founded upon the contract as it stands, could undoubtedly be maintained. It was a contract for the

The Tow-boat James McMahon.

benefit of the tow-boat, to enable her to earn towage, and it in fact brought her towage to the amount agreed, viz: \$15. If, then, the contract had become binding on the owners of the tow-boat, why should not the boat herself be bound, being as it was for the benefit of the tow-boat? No reason is seen for exempting the vessel from liability in such a case, if vessels are ever to be held bound by contracts of affreightment.

It is supposed that the case of *Vandewater v. Mills* (19 How. 90), referred to in the case of the *General Sheridan* as authority for the decision in that case, is an authority adverse to the libellant's claim in this case. But for the reasons above stated, I am of the opinion that the facts in this case already alluded to take it out of the scope of any rule declared in the case of *Vandewater v. Mills*. Moreover, this latter case is commented upon, by the Supreme Court itself, in the case of *Buckley v. Naumkeag Steam Cotton Co.* (24 How. 392), and pains apparently is there taken to limit its effect, for it is treated as laying down no different rule from that declared in *Grant v. Norway*, and the *Schooner Freeman* (18 How. 182), in which cases the action *in rem* failed, for want of authority in the master to bind the vessel for the contract sued on, and as belonging to a class of cases where, as the court say: "There was no contract of affreightment binding between the parties, as there had been no fulfilment on the part of the shipper, namely, the delivery of the cargo." Here the contract is a towing contract, which does not look to the delivery of a cargo on board the ship by a shipper thereof, but to a taking a boat to be part of a tow, on a voyage which was not abandoned, but made; and this contract had become binding on the owners of the tow-boat and been fulfilled by the other party.

The Tow-boat James McMahon.

In the case last referred to, from the decisions of the Supreme Court (24 How. 292), the court go on to announce that it is too narrow and limited a view of the liability of the vessel to require a physical connection with the vessel as a foundation for the liability *in rem*.

In this case, then, it is a mistake to suppose that the fact that the canal boat was never taken hold of by the tow-boat, is sufficient to exempt the tow-boat from liability. That fact is not material in a case like this, where the tow-boat agreed to come and take the canal boat and tow her to Troy, on a certain voyage, and where the towage agreed on was paid, and the voyage not abandoned, but made; the canal boat not being taken, simply because the tow-boat neglected to stop for her. In such a state of facts, the liability of the tow-boat was complete from the moment of her omission to stop for the Mars, and she is liable to be proceeded against *in rem* for the damages resulting from such violation of the contract.

The exception is therefore overruled, and a decree given in favor of the libellant, with leave to the claimant to file an answer upon payment of costs.

For libellant, *T. C. Campbell*.

For claimant, *E. D. McCarthy*.

SEPTEMBER, 1878.

THE STEAMSHIP CORNWALL.

WHARFAGE.—MAKING FAST TO PIER.

The C. was a large steamship, having a regular berth at a pier, which she could enter with safety only at slack water. She arrived at her berth one day at 10 a. m., when the tide did not serve till 1 p. m., and she accordingly made fast at the end of her pier. She was so long that she overlapped the piers on either side, and a line was thrown from her to the pier which was overlapped by her bow, for her better security while waiting the tide : *Held*, That the C. did not "make fast to" such pier within the meaning of the wharfage act of the State of New York, and that the owner of that pier was not entitled to recover against her for wharfage.

BENEDICT, J. This is an action to recover wharfage. The facts are not in dispute.

The Cornwall is a large steamship which has a regular berth at the pier at foot of Fletcher street, but which she could enter with safety only at slack water. At the time in question, she arrived at her slip at 10 a. m., but the tide did not serve till 1 p. m. She accordingly waited for the tide and made fast at the end of the pier. When so made fast, her length was such that she overlapped an adjoining pier on either side. To the pier thus overlapped by her stem, which belonged to the libellant, a line was run from the steamship for her better security, while so waiting for the tide.

Upon these facts the libellant claims to be entitled to recover wharfage for a day, upon the ground that the steamship made fast to his wharf for part of a day, within the meaning of the statute of the State, which declares that "it shall be lawful to charge and receive from every vessel that

The Steamship Cornwall.

uses or makes fast to any pier, or makes fast to any vessel lying at such pier or to any vessel lying outside of such vessel—for every day or part of a day, for a vessel of 200 tons burden and under, 2 cents per ton, etc., etc.”

This statute has been interpreted by the highest court of the State (*Taylor v. The Atlantic Mutual Ins. Co.*, 37 N. Y. 275), to intend that the rates named are to be paid for the use of the wharf, and also to make the fact of making fast to a wharf or to any other vessel which is itself fastened to such wharf, evidence of a use of the wharf within the meaning of the act.

But I do not understand that it has ever been held that proof of making fast to a wharf shall, under all circumstances, be conclusive evidence of a use of the wharf within the meaning of the Act. In the moving of vessels, it often becomes necessary to cast a line upon a wharf, when no one can suppose that the wharf has been used within the meaning of the statute, so as to render the vessel liable for wharfage.

Evidently, it was intended that there should be some limitation attached to the words “made fast to.” It may be difficult to fix with precision the extent of the limitation intended; but I think it can safely be said, that, notwithstanding the fact that this steamship had a line fast to the libellant’s pier, the other facts in evidence show that she did not make use of the wharf within the meaning of the act. It may be that for such an obstruction of access to the libellant’s wharf as the evidence shows an action can be maintained; but upon the facts proved no liability for wharfage was incurred on the part of the Cornwall.

The libel is therefore dismissed with costs.

For libellant, *Beebe, Wilcox and Hobbs.*

For claimant, *Foster & Thomson.*

The Ship Annie H. Smith.

Southern District of New York.

OCTOBER, 1878.

THE SHIP ANNIE H. SMITH.

DISAGREEMENT AMONG SHIP OWNERS.—SALE OF SHIP ON APPLICATION OF
HALF OWNERS.—CHARTER EVIDENCE.—MORTGAGE.

The Admiralty has jurisdiction to order the sale of a vessel on the application of the owners of one-half of her, in case of a disagreement between them and the owners of the other half. But such disagreement must be such as prevents the present employment of the ship, and the owners asking for a sale must either propose a different employment of the ship, or, if they merely object to the voyage or the master proposed by the other moiety, their objection must be based on reasonable ground.

The owners of half of a ship applied to the court for a decree of sale. It appeared that, at the time of filing the libel, the ship was loading in New York under a charter for San Francisco. Some of the owners of the vessel resided in New York and some in Maine, and, when she had been in New York before, some of her business had been done by S. & Co., who, together with the father of S., owned and controlled one-half of the ship. S. had accepted this charter while the vessel was yet at sea, after a conference with his father who was in Maine, and made some effort to consult with the Maine owners. After the charter had been accepted L., who represented the owners of the other half of the ship, came to New York and, having inquired of S. if she was chartered and received an evasive answer, then informed S. that, as representing the owners of the other half, he did not wish the ship chartered. S. then told him the ship was chartered. L. did not then repudiate the charter or take any steps to prevent the signing of the charter party by the master, which was done after the arrival of the ship in New York. There was dissatisfaction on the part of L. and those owners who acted with him as to the agency of S. & Co. or the father of S., and as to some previous transactions in reference to the ship; and after the vessel was partly loaded, L. and the other owners for whom he acted filed a libel against the ship and the owners of the other half to obtain a sale:

The Ship Annie H. Smith.

Held, That, under the circumstances of the case, the libellants had not shown sufficient grounds to call on the court to exercise the discretionary power of sale ;

That evidence tending to show that as to part of the vessel, to which L. held the legal title, the master of the vessel held an equitable interest by reason of which he had intervened in the cause and answered, opposing the sale, was admissible in order to show to the court all the circumstances in the face of which it was called to exercise its discretion.

CHOATE, J. This is a suit of licitation and partition brought by the owners of a moiety of the ship Annie H. Smith, against the ship and the owners of the other moiety. The libel prays a sale of the ship under the decree of the Court and the distribution of the proceeds among the owners. That the Courts of Admiralty have jurisdiction of such a suit, seems to be settled by authority, so far as this country is concerned. There are three reported cases in which the Court has entertained such a suit, and granted the relief here prayed for. They are the case of the sloop *Hope* in the District Court of South Carolina in 1793 (*Bee's Rep.* 2), the case of *The Seneca* in the Circuit Court for the Eastern District of Pennsylvania in 1829 (18 *Amer. Jur.* 486), and the case of *The Vincennes* in the District Court of Maine, in 1851 (*cited* 2 *Parsons on Shipping and Adm.*, 343). These decisions have received the emphatic approval of eminent text writers as being in accordance with the principles of the maritime law. (*Story on Partnership*, § 438 ; *Benedict's Admiralty* 2d Ed., § 274 ; 2 *Parsons A. & S.* 343 ; *Dunlap's Adm. Pr.*, p. 67 ; 2 *Kent Com.*, 370.)

In the case of *The Seneca*, Judge Hopkinson, of the District Court, denied the relief on the ground that the Court had not jurisdiction, and the English Court of Admiralty has also declined to exercise this power, but the great weight of authority is in favor of the jurisdiction ; and in cases where the relief is shown to be necessary, the sale by decree of the Court

seems to be the only practicable means of restoring the ship to its proper use as a vehicle of commerce, and therefore highly beneficial to those public interests which are peculiarly the care of the Admiralty. The fact that the power is not exercised in England may be accounted for, perhaps, by the well known restrictions to which the jurisdiction of the English Admiralty Courts was subjected in early times through the jealousy and the greater power of the other Courts. This power of sale, so far as the cases have gone, has only been exercised where the owners are equally divided in respect to the employment of the ship or appointment of the master. Where they are unequally divided, the rights of the majority and minority owners respectively are for the most part well settled. The majority in interest have the right to employ the ship in navigation, notwithstanding the objection and protest of the minority and their refusal to join in the adventure, but in such a case the minority may require security for the safe return of the vessel. If the majority in interest unreasonably refuse to employ the ship, it has been suggested that a sale may be enforced. (*Willings v. Blight*, 2 Pet. Adm. 290.)

Of the cases where a sale has been decreed upon a disagreement between equal moiety part owners, the case of *The Seneca* is the only one reported with sufficient fullness to show the particular circumstances under which the power was exercised, and the views of the Court as to the reasons and grounds for the exercise of the power to decree a sale as between the equal part owners, which reasons and grounds must, of course, limit and control the action of the court, in ordering or refusing a sale in each case presented to it. In the case of *The Seneca*, the respondent was owner of one-half of the vessel, was in possession of her, and had made several voyages in her as master, to the dissatisfaction of the owners

The Ship Annie H. Smith.

of the other half, whose interest the libellants had purchased; and he had projected another voyage, and insisted on fitting her out at great expense, and upon going in her as master. The libellants on the other hand had refused to incur any expense for the outfit of the vessel for a voyage *to be conducted by the respondent*. They had appointed or attempted to appoint another master, and were ready and willing to employ the ship. It is obvious that the disagreement between the part owners in that case was such in its nature and effect, under the circumstances in which the vessel was placed, that it operated effectually to prevent the present use or employment of the vessel at all in navigation. The parties being equal in their right to control the employment of the ship and the appointment of the master, the effect of the disagreement was, as Mr. Justice Washington distinctly points out (p. 492), that "the vessel must remain unemployed, since neither owner can *otherwise than tortiously* send her to sea against the will of the other."

I think, also, that it is clear from the report of the case, that it was the opinion of that learned judge, that the power of the court to interfere and order a sale depends upon this as an essential and controlling element: that in the situation of the parties and the ship, as existing when the suit is brought, the ship cannot rightfully be sent to sea by either party. And it also appears from the authorities upon which he relies as supporting his opinion, that such is the ground or one of the chief grounds upon which the power to sell rests, as the same has been declared or recognized in the foreign maritime codes to which he refers. Thus he cites with approval, the following statement of the provisions of the Roman Marine Code: "(1.) That the opinion and decision of the majority in interest of the owners concerning the employment of the vessel is to govern, and, therefore, they may on any

The Ship Annie H. Smith.

probable design, freight out or send the ship to sea, though against the will of the minority. (2.) But if the majority *refuse* to employ the vessel, though they cannot be compelled to it by the minority, neither can their refusal keep the vessel idle, to the injury of the minority, or to the public detriment; and since, in such a case, the minority can neither employ her themselves, nor force the majority to do so, the vessel may be valued and sold. (3.) If the interest of the owners be *equal*, and they differ about the employment of the vessel, one-half being in favor of employing her, and the other opposed to it, in that case the willing owner may send her out." He also cites the 6th Article of the Marine Code of France, said to have been published as early as 1681, as follows: "No person can constrain his partner to proceed to the public sale of a ship held in common, except the opinions of the owners be equally divided about the undertaking of some voyage." And he also cites and accepts as just and reasonable, Valin's commentary on this rule, as follows: "The case excepted in this article is where the opinions of the parties are equally divided on the undertaking of some voyage, upon which we may remark, that the question is not of two equal opinions, of which one is to leave the vessel without any kind of voyage, and the other to undertake such or such a voyage, there being no doubt in that case, that the opinion favorable to a voyage ought to prevail, saving the right to discuss the projected voyage; but solely of the case of two opinions equally divided upon the particular enterprise projected by one moiety of the persons interested, and rejected by the other moiety; whether that moiety proposes, on its part, another voyage, or confines itself to a disapproval of it, *provided, nevertheless, that it gives plausible reasons for its conduct*; otherwise this would have the air of an absolute refusal to permit the vessel to be navigated, which justice could not tolerate, being contrary to the

The Ship Annie H. Smith.

object of the vessel, to the original intention of the parties, and the interests of commerce." The particular point of disagreement in the case of *The Seneca*, was, as to who should go as master; and Mr. Justice Washington held that although not expressly mentioned in these foreign codes, the case was within their reason, because a disagreement as to the master operated as effectually as a disagreement as to the voyage to be undertaken, to prevent the ship from being sent to sea; and he held further, that if the moiety objecting to a master, honestly entertained an objection to him, on the ground of their want of confidence in his skill or integrity, they did assign a plausible reason for their conduct. From this case, therefore, and the authorities on which it rests, may be deduced these rules, as governing and limiting the exercise of this power of sale on the application of a moiety of the owners: *first*, that the disagreement must be such as prevents the present employment of the ship in navigation; and, *secondly*, that the objecting moiety asking for a sale, must either propose a different employment of the ship, or, if they merely object to the voyage or the master proposed by the other moiety, their objection must be based on reasonable grounds. And this result is entirely in accordance with the principles applied by Courts of Admiralty in dealing with the rights, duties and powers of part owners of ships, whether equally or unequally divided in opinion, and which are well expressed by Judge Peters, in the case of *Willings v. Blight*, 2 Peter's Adm. Dec. p. 292: "It is a principle discernible in all Maritime Codes, that every encouragement and assistance should be afforded to those who are ready to give to their ships constant employment, and this not only for the particular profit of owners, but for the general interests and prosperity of commerce. If agriculture be, according to the happy allusion of the great Sully, 'one of the breasts from which the State must

The Ship Annie H. Smith.

draw its nourishment,' commerce is certainly the other. The earth, the parent of both, is the immediate foundation and support of the one, and ships are the moving power, instruments and facilities of the other. Both must be rendered productive by industry and ingenuity. The interests and comforts of the community will droop, and finally perish, if either be permitted to remain entirely at rest. The former will less ruinously bear neglect and throw up spontaneous products; but the latter requires unremitted employment, attention and enterprise, to insure utility and profit. A privation of freight, the fruit and crop of shipping, seems therefore to be an appropriate mulct on indolent, perverse, or negligent part-owners. The *drones* ought not to share in the stores acquired and accumulated by the labor, activity, foresight and management of the *bees*. Although the *hive* may be common property, it is destructively useless to all if not furnished with means of profit and support by industry and exertion, which should be jointly applied by all before they participate in beneficial results. Nor should the idle and incompetent be permitted to hold it vacant and useless, to the injury and ruin of the industrious and active."

Turning now to the facts of this particular case, it will be seen that the libellants' case does not come in either particular within the rule thus established by the case of *The Seneca*; the disagreement between these part owners does not operate to prevent the present employment of the ship, nor do the libellants, the party objecting to the employment of the ship proposed by the other moiety, either propose any other employment, or allege or show any plausible grounds for objection to that proposed by the other party. The libel alleges, as to the points of difference between the parties, as follows: "That the owners of said ship are unable to agree in reference to the business and employment of said vessel

The Ship Annie H. Smith.

That, while the vessel was at sea on a voyage to New York, the libellants notified the respondents that the said vessel must not be chartered, and the said respondents agreed that some arrangement should be made between the owners of the vessel with reference to the employment and control of her after her arrival in the port of New York. That thereafter the said vessel arrived in this port, where she still remains, but that the respondents refuse to make any reasonable arrangement with the libellants as to the management of her * * * That the master of the said vessel is acting with the said respondents, and that the respondents, with said master, intend to send the said vessel from this port on a voyage to the port of San Francisco, from which voyage these libellants have expressly dissented."

It will be seen that the averments of the libel are very indefinite as to the nature of the libellants' dissatisfaction. They express no want of confidence in the integrity and skill of the master, nor do they ask for his removal. They allege the prohibition by themselves of the chartering of the vessel, and the intention of respondents to send her to sea upon a voyage from which they have dissented; but they do not allege the grounds of their objection to the voyage proposed, nor allege that they intend to use her in any different employment. The libel, therefore, might be open to objection, under the rules above stated, as not making out a case; but the cause has been tried and argued, without reference to the sufficiency of the pleadings, and will be considered and determined, upon the evidence independently of any want of averment in the libel.

A brief statement of the history of the transactions between the parties in reference to this ship is necessary to the understanding of the points raised.

The Ship Annie H. Smith.

On the 10th December, 1875, Nickerson & Rideout, ship builders of Calais, Maine, entered into a written agreement with Capt. Bartlett, a shipmaster, to build a ship of certain dimensions, description and materials. The agreement was in form between Nickerson & Rideout of the first part, and Bartlett and the several "undersigned" of the second part. In point of fact, no subscribers were found to sign and become parties to it till long afterwards. Nickerson & Rideout agreed that the hull, spars and iron work should be finished and delivered at Calais on or before November 5th, 1876, free of all liens. The parties of the second part agreed to take the proportional parts set opposite their names, and to pay for the same at the rate of \$33 per ton in certain installments, the title to vest in the subscribers in proportion to the several interests and amounts paid. It also provided that Nickerson & Rideout should pay no commission for superintending the construction, and Nickerson & Rideout joined with Bartlett in a guarantee that the subscribers should not have to take any larger proportion of the vessel than that for which they signed. Capt. Bartlett signed the agreement without adding to his signature any amount. In fact this agreement was devised by Bartlett and the builders as a scheme for getting a ship built for Bartlett to command, and with the expectation that they would find other parties to join with them to take shares and thus furnish the means for its construction. The plan was for Capt. Bartlett to superintend the building of the ship without compensation, except such as should result to him from the success of the adventure in his employment as master, and in such interest as he should be able to take in the ship. In June, 1876, Capt. Bartlett interested in the enterprise F. H. Smith & Co., of New York, shipping agents and commission merchants, Wm. H. Smith, the father of F. H. Smith, a New

The Ship Annie H. Smith.

York merchant and ship owner, and Chas. N. Lord, of Bangor, Maine, a banker. They were all personal acquaintances of Bartlett's and had all formerly lived at Bangor. The first to sign the contract was F. H. Smith & Co., who signed for $\frac{1}{16}$. Then Lord signed for $\frac{1}{8}$, and Morse & Co., of Bangor, whom he brought in, for $\frac{1}{8}$. Then one Loughton for $\frac{1}{32}$, and W. H. Smith for $\frac{3}{16}$. These were all the parties that signed the contract, taking in all $\frac{3}{4}$ of the ship. I think the evidence is sufficient to show that it was held out by Capt. Bartlett, as an inducement to F. H. Smith & Co., and to W. H. Smith, to sign, that the firm of F. H. Smith & Co. would be employed to attend to the business of the ship when she should be in New York, and that this was made known to Lord, Morse & Co. and Loughton when they signed the contract. Such employment was in the line of business of F. H. Smith & Co. These parties signed about the same time, about the 19th of June, 1876. The interest of $\frac{1}{8}$ each, taken by Lord and Morse & Co., was subscribed for by them in pursuance of the terms of a written agreement between them and Capt. Bartlett, executed on the same day with their execution of the building contract. This agreement recites that Lord and Morse & Co. "at the special instance and request, and *for the special benefit*" of Bartlett, had signed the building contract to take one-quarter of the said ship. By it Lord and Morse & Co., agreed that "after the performance of the provisions of the agreement on Bartlett's part, they would convey to him" whatever of said interest in said ship shall remain unsold, "and would reassign" all collaterals named in the agreement not appropriated by the terms and spirit of the agreement. It was then agreed, on Bartlett's part, to keep the interest insured, and to repay any taxes paid thereon by Lord and Morse & Co., and that, whenever Lord and Morse & Co. should sell said

The Ship Annie H. Smith.

quarter, or any less portion, they should deduct from the sum received the following commission : from sale of a quarter, \$1,500 ; one-eighth, \$800 ; one-sixteenth, \$400 ; that commissions and interests on all moneys paid out by Lord and Morse & Co. were to be allowed to them as follows : $1\frac{1}{2}$ per cent on the whole sum paid for the one-quarter, $1\frac{1}{2}$ per cent for advancing every six months, and 10 per cent per annum, payable semi-annually on all balance due, until paid, including in advances all sums paid for repairs and disbursements, and crediting earnings received. Bartlett agreed to pay one-half of all moneys paid out under the contract, with interest and commissions, within two years, and the balance within three years from the date of the contract. Bartlett then agreed to assign to Lord and Morse & Co., as security for his faithful performance of the agreement, all his interest in the estate of one Pollard, valued at \$3,400, and a policy of insurance on his life for \$3,000, which he agreed to keep in force. The agreement then provided that, if Bartlett neglected and refused to pay the interest semi-annually, except when he was at sea, and then within two months after his arrival at his next port of destination, then Lord and Morse & Co. should be entitled to hold the sum of \$4,000 of said collaterals as a forfeiture for the non-payment of interest. Upon the execution of these agreements, Bartlett transferred the collaterals mentioned to Lord and Morse & Co., and Lord and Morse & Co. made their first advances towards building the ship.

Some two months after these transactions Nickerson & Rideout failed. Meanwhile, some further interests had been taken in the vessel. W. H. Smith took a quarter, and there remained $\frac{9}{84}$ not taken, on which, by an agreement between Nickerson & Rideout on the one side, and Lord and Morse & Co. and W. H. Smith on the other, these parties had ad-

The Ship Annie H. Smith.

vanced on the $\frac{9}{84}$, leaving, however, in Nickerson & Rideout a right to redeem the interest on paying up the advances. The failure of Nickerson & Rideout made it necessary to make arrangements with other parties for completing the ship, and increased the cost of the ship to the subscribers. Proceedings were taken to enforce claims for liens by several parties who had furnished materials for the ship, among others by F. H. Smith & Co., who had an unpaid claim for hard pine, amounting to about \$10,000. W. H. Smith acted in the matter of this claim for a lien for F. H. Smith & Co., and the asserting of this claim caused some dissatisfaction on the part of Lord and Morse & Co. with W. H. Smith. And, after some verbal agreement between them, and some misunderstanding as to what that agreement was, Smith agreed, in writing, not to enforce this lien against their quarter interest. Nickerson & Rideout finally went into bankruptcy, and their right to redeem the $\frac{9}{84}$ passed to their assignee. From the time of this difficulty about the hard pine, Lord and Morse & Co. began to entertain some hostile feelings towards the Smiths, and were determined, if they could, to prevent the Smiths, who already owned one-half the vessel, from acquiring any further interest. W. H. Smith was desirous of keeping the whole or a part of the title to the $\frac{9}{84}$, on which he, with Lord and Morse & Co., had advanced, but which stood in the name of W. H. Smith for $\frac{3}{84}$, Lord for $\frac{3}{84}$, and Morse & Co. for $\frac{3}{84}$, and he took an agreement from Nickerson & Rideout, assigning him their right to redeem this interest, but never acted on it, probably because their bankruptcy made it evident that he could not get a good title in that way. There was some conversation between him and Lord about the matter, and Lord pretended to him that he would rather have his money, but afterwards, jointly with Morse & Co. and other Bangor owners acting with him,

'The Ship Annie H. Smith.

Lord procured one Wilson to purchase the right to redeem from the assignee, and then Wilson paid off the advances of Smith, Lord and Morse & Co., and held the $\frac{9}{84}$ for the benefit of Lord, Morse & Co. and the others who joined them in the proportions in which they advanced him the money to purchase and redeem the interest. The result was that Lord and Morse & Co. prevented the Smiths from getting more than one-half of the ship, and they themselves got control of the other half, except one small interest in one Snow, which they purchased in July last to make their half complete. The proceedings of Lord and Morse to bring about this result as to the $\frac{9}{84}$ were artful and cunning, and they outwitted Smith, but they are not chargeable in the matter, as alleged in the answer, with any legal fraud which taints their title. Their proceedings were secret, and it was not till shortly before the filing of this libel that W. H. Smith or F. H. Smith & Co. learned that this share or $\frac{9}{84}$ was held in the interest of Lord and Morse & Co., although it was communicated confidentially by Lord to Capt. Bartlett.

The failure of Nickerson & Rideout led to a change in the agreement between Bartlett and Lord and Morse & Co. as to the one-quarter on which they were advancing for his benefit, and by subsequent agreements it was provided that additional sums which they should become liable to pay beyond the price stipulated in the original building contract should be first repaid to them before they should convey to him the quarter interest under the agreement of June 19, 1876.

These additional amounts have never been ascertained, and cannot be so till the lien suits still pending are brought to an end.

The ship was completed and sailed on her first voyage, under command of Captain Bartlett, on or about April, 1877,

The Ship Annie H. Smith.

and she has continued under his command from that time to this, making several voyages. She has been very successful, netting in dividends to her owners \$10,000, besides paying for her copper, which cost \$5,000, all in the period of sixteen months. Her cost was about \$75,000. Her first voyage was from New York, and she arrived in New York again on the 17th of August last. During these voyages Capt. Bartlett has generally acted as the agent of the owners in making charters, disbursing the ship, and generally in attending to her business.

The first charter, however, was made in New York, after consulting all the other owners, by F. H. Smith & Co., who signed the charter as "*Agents for the Owners*," and they have received and distributed at least one remittance and have attended to disbursing some of the ship's bills in New York, and in February, 1878, rendered an account to the owners. There was some delay in making this distribution by F. H. Smith & Co., owing to some unsettled bills being out, and this delay in the receipt of his dividend was made the ground of some complaint against F. H. Smith & Co. by Mr. Lord, in his confidential correspondence with Captain Bartlett, and he requested Captain Bartlett in future to remit the share of the Bangor owners to him (Lord) direct, and not through F. H. Smith & Co., stating that there would be no impropriety in his so doing, and that there had never been any agent of the ship appointed except himself [Bartlett]. Indeed, in his letters to Bartlett, Lord constantly recurred to this idea that there had been no agent appointed, and expressed himself dissatisfied with the existing state of things, and further expressed the hope that before long they might get an agent appointed.

By all this, taken in connection with what Lord knew of the understanding at the time of signing the building agree-

The Ship Annie H. Smith.

ment, and with his conduct in New York with reference to the present charter hereinafter referred to and the power of attorney held by him as hereinafter stated, I understand that his meaning was that, notwithstanding that original understanding as to F. H. Smith & Co.'s doing the business at New York and the fact known to him that F. H. Smith & Co. had from the beginning *acted* as agent for the owners in New York, as occasion required, yet there was no *permanent* appointment of an agent and that nothing had been done to bind the owners to continue the business with F. H. Smith & Co. or to prevent their appointing another agent..

But this dissatisfaction, such as it was, was not communicated to the Smiths, although W. H. Smith knew that there was some hard feeling about the old hard-pine business.

In June or July, 1878, the ship was on her way homeward for New York, and it became necessary to make arrangements for a new voyage. On the 7th of July, the captain wrote to F. H. Smith & Co. from Dungeness recommending that she be chartered to arrive for San Francisco. On the 29th of July, F. H. Smith & Co., having obtained an offer from Sutton & Co. to take her for \$16,000 for a voyage to San Francisco, wrote a letter to W. H. Smith, who was then at Bangor, stating the terms of the offer and that it must be closed by August 1, and asking instructions. On the 31st of July, W. H. Smith went to see Morse, one of the Bangor owners, and showed him the letter and asked his advice.

There is some conflict of testimony between Morse and Smith, as to what took place at this meeting, but I think Mr. Smith's account the more probable of the two. Mr. Morse's comment on the offer was, that he thought there was not much money in it, but he would talk with Lord and see him again. Smith waited till late at night, and hearing nothing further from Morse, telegraphed to F. H. Smith & Co. to do what

The Ship Annie H. Smith.

they thought best with the ship. Lord at that time was not in Bangor, and was not consulted. F. H. Smith & Co., on receipt of this telegram, on the next day, Aug. 1, signed the charter on behalf of the owners, and it was executed by Sutton & Co. Sutton & Co. requested them to keep it secret till the ship's arrival.

On the 7th of August, Lord came to New York. He brought with him a power of attorney, executed by all the libellants, authorizing him, so far as their interests were concerned, to remove the captain, and to appoint a new captain in his place, and "*to change the agency, management, and control of said ship, as seems to him to be for the interests respectively, and also to settle up the accounts of the ship with F. H. Smith & Co., who have assumed to act as the agents of the said ship heretofore, and to audit their accounts;*" also to sell and convey their interests, provided the whole of their interest was sold together, "it being our intention to stand together in the matter of the ownership of said vessel." This paper shows conclusively, that up to that time, F. H. Smith & Co. were assuming to be, and had been suffered by the other owners to act as agents of the ship in New York, and that Lord's declarations in his letters, about there being no agent appointed, mean only what is above indicated. His conversation with F. H. Smith & Co. indicates the same thing. After some general conversation, he asked F. H. Smith *if the ship was chartered*, a question which he would not have asked except of one, who had, or at least was known to him to be assuming to have some authority to act for the owners in the matter of a charter. Smith, having regard to the request of Sutton & Co., gave an evasive answer, but said she was as good as chartered. Lord went out, and soon after returned with a witness, and said to Smith that they, *i. e.*, the Bangor owners, didn't want the ship chartered till she arrived. Then

The Ship Annie H. Smith.

Smith told him she was chartered, and stated the terms of the charter. Lord said *he was sorry*. It is insisted, on the part of the libellants, that though the charter is binding on the *ship*, because afterwards signed by the master, yet that it is not personally binding on them, because F. H. Smith & Co. had no authority to act for them, and because, before the master signed it, they prohibited the making of the charter so far as they were concerned, or, as it is expressed in the libel, they “expressly dissented from it.” There is really no essential conflict of testimony as to what passed in the interviews between Mr. Lord, acting for the libellants, and F. H. Smith & Co. on the 7th of August, and afterwards between Mr. Lord and the respondents, and Captain Bartlett, after the ship’s arrival, down to the time of the commencement of this suit. And the evidence does not show, in my judgment, that the libellants expressly dissented from the charter in any other sense than this, that they found fault with F. H. Smith & Co. for having made it without consulting them. The evidence does not warrant the conclusion that, when they found it had been made under an assumed authority to act for them in common with all the other owners, they sought or desired to undo or repudiate what was thus done in their behalf, or that they took the ground that they would not be parties in this new adventure. What they did and what they failed to do, what they said and what they failed to say, concur to this conclusion. In the first interview, Lord introduced the subject by asking Smith *if she was chartered*. Why did he ask that question, unless he thought F. H. Smith & Co. might have chartered her? If his pretence is true that he knew nothing about any understanding that F. H. Smith & Co. should be the agents, and that they had no existing authority as agents, he would naturally have asked him, “What shall we do with the ship?” but would not have asked him, “Is she chartered?”

The Ship Annie H. Smith.

Again, when at the second interview he said, "Fred, we don't want the ship chartered," the language was only appropriate as addressed to one who had at least some color of authority to act for all the owners. And when, in answer, Smith said, "She is chartered," Lord's reply, which he himself testifies to, "I am sorry," was only appropriate as addressed to one who had some authority to do what was done. It expressed regret and dissatisfaction *with what had been done*, but recognized it *as done*. On his theory of total want of authority in Smith, his natural reply would have been, "Why, you can't charter the ship." Again, on the theory of the libellants that the charter became binding *on the ship* only because of its being signed by the *master*, the natural thing for the libellants to do, if they found that Smith had without authority signed a charter which was not yet binding, either on the ship or owners, was to have taken measures to prevent its becoming binding, either by instructing Smith that it should not be presented to the master for approval, or by leaving notice to be given to the master on his arrival prohibiting him from signing it. In fact, Lord did nothing of the kind. He knew that the master had not signed it, and that he was expected to arrive in a few days. Still further, if Lord either took the ground that the charter was not binding on the ship, or on the owners whom he represented, it is hardly conceivable that he should not have made some attempt to undo what had been done, at least to the extent of notifying the charterer, whose name was communicated to him, that the charter was void or not binding on his co-part-owners in order to avoid future complications and claims.

He did nothing of the kind, nor did he request Smith to do anything of the kind. The whole evidence tends to show that he acquiesced in what had been done *as done*, reluctantly, it is true, and with expressions of regret, but still that he

The Ship Annie H. Smith.

acquiesced. It is true that he told Smith that the owners whom he represented had not been consulted, but this is not inconsistent with the intention so plainly appearing upon the other parts of the conversation. It was rather in the way of blame or fault-finding, that in so important a matter as the chartering of the ship he had not consulted all the owners, than as a distinct assertion that, for want of such consultation, what had been done was of no validity, or that he intended or felt that he had the right to repudiate it. They got into a discussion as to the respective interests which they severally represented. Smith was under the impression that he and his father and his sister held title to a little more than half the ship. Lord told him that he represented half. I see no reason to disbelieve Mr. Smith's statement that up to that time he did not know that the title to the $\frac{3}{8}$ part of the $\frac{9}{8}$ on which his father had advanced to Nickerson & Rideout, had been transferred by his father, and his impression that the Smiths controlled a little more than half was evidently based on the state of the title previous to that transfer. I see no reason to believe from the testimony that the action of F. H. Smith & Co. and W. H. Smith, in the making of this charter, was actuated by any other motive than that of doing what they thought was for the best interest of all concerned; nor do I see any evidence of a design in what they did unfairly to forestall the action of their co-owners, or to commit them to a charter that they did not approve. F. H. Smith & Co. acted under what they thought was the express authority of the majority interest. The occasion was pressing. Their letter to W. H. Smith at Bangor where the other owners principally were, did not request him to see the owners, but it may well have been within their expectation that he would do so, as in fact he did; and although it can be easily pointed out, that they might have done more to obtain the

The Ship Annie H. Smith.

opinions of all, as by writing a letter to each owner, yet I can not find that what they did was not supposed by them to be a reasonable, fair, and proper attempt under the circumstances, to communicate with the other owners before closing with the offer for a charter which they believed to be a beneficial charter, as the market then was.

Now, I think in the circumstances in which Lord found that his co-part-owners were placed, when he learned that a charter had been made on the 7th of August, especially in view of the authority which, as appears conclusively by the power of attorney held by Lord, all the owners up to that time had permitted or suffered F. H. Smith & Co. to exercise—an imperfect and temporary authority, it may be, but one never up to that time revoked; I say I think that he was called upon as the representative of his co-part-owners to declare himself explicitly and in terms that could not be misunderstood as to whether or not he held the charter binding, and as to whether or not his co-part-owners would join in this new adventure projected on their behalf. Yet nothing that he said or did, conveyed or was calculated to convey to the minds of the respondents the idea that he held the charter to be void, or repudiated what had been done in their names, and on their behalf. He could not, as between himself and his co-owners, who had assumed to act in his behalf, lie by, and by the use of doubtful expressions as to his intention at that time, afterwards, in case of the success of the adventure, claim that he was entitled to share in the profits on the ground that he had bound himself, and in case of disaster defend against a claim for contribution on the ground that he had not bound himself. For aught that appears if he had declared himself not bound, his co-owners might then have procured from the charterer a release from the charter. Freights were still falling, and other ships

The Ship Annie H. Smith.

could have been procured on terms as favorable for the charterer.

On the 17th of August the ship arrived. F. H. Smith & Co. presented the charter to the master, and he approved it. Afterwards, on the 22d or 23d of August, Lord came to New York again. He saw the master and the respondents. He offered to name a price at which he would buy or sell, and he offered that the Smiths should name a price at which they would buy or sell, but as regards the charter nothing occurred to alter the situation of affairs, except that he learned from the master, that the lay days under the charter would commence on the 25th of August, and he did nothing, but, so far as his action was concerned, allowed the business to proceed till the filing of this libel on the 20th day of September. In the meantime the loading of the ship had commenced, and her bills of lading were issued for about 200 tons of general cargo. The evidence is that freights have been falling ever since this charter was made; that the charter was the best thing that could have been done with the ship at the time it was made, and better than any charter that could be made now; that it is a good charter for the ship, and will bring her to San Francisco in time to avail of what seems to be a fair opportunity for business, in carrying grain from that port. Although in their *conversation* Lord and Morse have expressed doubt as to the charter being profitable and beneficial to the ship, they have not sustained these opinions by any evidence. The evidence is all the other way. The libel alleges that "while the vessel was at sea on a voyage to New York, the libellants notified the respondents that the vessel must not be chartered, and that the respondents agreed that some arrangement should be made between the owners of the vessel, with reference to the employment and control of her, after her arrival," and that

The Ship Annie H. Smith.

“the respondents refuse to make any reasonable arrangement with the libellants, as to the management of her.” As to the averment that the libellants notified the respondents that she must not be chartered, I find that it is not proved, but that at the time the libellants communicated their wish that she should not be chartered, the charter was then already made, in which the libellants afterwards acquiesced. As to the alleged promise to make some arrangement about the management of the vessel, the facts seem to be as follows: At the interview on the 7th of August, Lord said to F. H. Smith that he was not satisfied with the management or with the arrangements as to the vessel. He did not then explain in what particular he was dissatisfied with the existing management. It was not said in reference to the charter, or, if it was so intended, it was not so said as to convey the idea to Smith that he meant that he wanted any different arrangement made about this charter. Understanding him to refer to the general management of the vessel, Smith told him he didn't know of anything wrong, but did not see why arrangements could not be made if he wanted it. Again, when he saw the captain, Lord told him that he was dissatisfied with the management. With the light thrown on the case by Lord's letters to Bartlett, and especially by the power of attorney which he held, executed by the libellants, it is evident that what was referred to, and which Smith could only guess at, was the matter of the agency of the vessel, a point which Lord had long had in mind, but on which he had not declared himself, for obvious reasons, to the Smiths. Now, as to this matter of the agency of the vessel in New York, and especially as to the continuance of the existing agency, such as it is, of F. H. Smith & Co., which Lord received express power from his co-part-owners, so far as he could act for them, to put an end to by a new appointment

The Ship Annie H. Smith.

of agent, it is to be observed that down to the time of filing the libel, it is not shown that the libellants, or Lord in their behalf, ever stated this point as a point of disagreement to the respondents, or to F. H. Smith & Co., or ever requested them to resign the agency, or ever proposed to the respondents to unite with the libellants in the appointment of a new or different agent; nor is there any evidence of any declaration of the respondents, or of F. H. Smith & Co. that they intend to hold on to this agency against the wishes of the libellants, or that they refuse or would refuse to join with the libellants in the appointment of an agent entirely impartial and satisfactory to both sides.

There has been, at no time up to the present, any dissatisfaction with the conduct of the master, Capt. Bartlett, on the part of any of the owners. There is no proof that the libellants have ever expressed a desire to the respondents to remove the Captain, or to have a different Captain appointed. The evidence is complete of his skill, and there is no proof of any want of confidence in his skill and integrity on the part of the libellants. No case is made which would justify his removal, and it is not claimed that there is. The ship was built with a view to his commanding her, as all the owners understood. He gave a year's time to superintending her construction. He has displeased the libellants by joining in resisting this application for the sale of the vessel, which would displace him from command as well as extinguish his right to become the owner of an interest under his agreement with Lord and Morse & Co., of June 19, 1876. But the libellants have suffered him to go on and sign the charter and receive cargo under it, and issue bills of lading, whereby he is personally bound, without any notice to him or the other part owners, of any dissatisfaction with him as master.

The Ship Annie H. Smith.

The libellants have not proposed to the respondents any different employment of the ship. So far as they have been shown to have expressed any intention as to what they would have done in place of making this charter, it is that they preferred to wait for freights to improve—to lay the vessel up till the fall.

It is proved that the market for ships is very dull, and at a forced sale they are likely to be greatly sacrificed.

The grounds of disagreement between these owners, as shown by the evidence, may be summed up thus :

(1.) They dislike Mr. W. H. Smith, because of his conduct in reference to the hard pine lien, and because they think he was unfair in regard to his agreement about not holding their interest for that lien; and their state of feeling towards him is such that they dislike to own in a ship with him, especially where he holds control of one-half the vessel.

(2.) They are dissatisfied with having F. H. Smith & Co. acting longer as agents of the vessel in New York, because they are identified in interest with W. H. Smith, because they were negligent in making a remittance, and because they made the charter without consulting the libellants, and because they (the libellants) prefer to have another agent disconnected from the Smiths—but this ground of dissatisfaction has never been made a subject of discussion between the parties, and before bringing this suit they never attempted to agree on any other agent.

(3.) The charter under which the vessel now is, was made without consulting all the libellants. The charter, however, is admitted to be binding on the ship, and has been shown to be binding on the libellants, by their acquiescence, and by their not expressly dissenting therefrom.

In any view that is taken of the charter, whether binding only on the ship or, by their acquiescence, on the libellants

The Ship Annie H. Smith.

also, the disagreement as to the charter between these parties is not such as prevents the ship from going to sea under this charter. In the case of *The Seneca*, neither party could, "otherwise than tortiously," that is, otherwise than by some act in violation of the rights of others, take the ship to sea.

In this case, neither party can "*otherwise than tortiously*" prevent the ship from going to sea. This is obviously so, if all parties are bound by the charter. It is equally so if the ship is bound to the charterer. The libellants may have their right to damages, but I do not see how they could now detain the ship. Again, these libellants, even if their right to separate themselves in this adventure survives their acts as above set forth, cannot, on the principles recognized in the case of *The Seneca*, having no employment of the ship to propose on their part, and having wholly failed to show that the enterprise proposed by respondents is not what the ancient codes cited call "a probable design," that is, a well planned and proper enterprise, and one fit for the ship to undertake, are not entitled to prevent the use of the ship by the other half-owners.

As to the alleged dissatisfaction with the agency of F. H. Smith & Co., that clearly would not prevent the use of the vessel, so long as there is a competent master, and in this case it is no obstacle to her going to sea under this charter. And in point of fact, the parties have never disagreed about this matter, since there has been no attempt to agree, and the very point of dissatisfaction urged was never made known to the respondents so that they were called upon to take ground on the question.

As to the dislike of, and distrust towards W. H. Smith, this is not a disagreement as to the employment of the vessel, and though, if it continues to exist, it may be the cause of

The Ship Annie H. Smith.

future disagreement, yet in itself, as a mere feeling, obviously it is of no account in this legal controversy.

It is, however, insisted, that the actual state of feeling between these parties is such, that a separation must be effected some time, if not now—that not to give them relief now is merely to prolong the controversy between them ; that it will only compel them to apply to the Court in California, or here again on the ship's next return to this port. The answer is obvious enough. This power to order a sale is a power to compel property owners to part with their property against their will. It is, therefore, an extreme resort justified by *necessity* only, from a regard, first, to the interests of commerce, and, secondly, to the relief of the parties from the distressing predicament which makes their property useless in their hands. The authorities cited above and the reason of the thing clearly show that this is the nature of the power. Now that *necessity* does not exist, either as to the relief of the public, or of the parties, till they have reached a point of actual present inability, by reason of the disagreement, to use the vessel. So long as that case of necessity is merely threatened, and lies in the future, it is as if it did not exist, and it may, in fact, never arise. Before this ship reaches San Francisco many things may happen to prevent this dead-lock occurring. The ship may be lost on the voyage. When she reaches there her true policy for the next voyage may be so obvious, that there will not be two opinions about it. The parties may reconcile their differences. It would seem that there ought not to be any great difficulty in disposing of what seems to be the principal point which the libellants insist upon, the establishment of an agency for the ship in which both parties can concur. A little more frankness and candor on the one side in dealing with the matter, and no great sacrifice of inter-

The Ship Annie H. Smith.

est or feeling on the other, would save these former friends from further litigation and certain loss.

The libellants probably can, if they are bent upon doing so, at the end of this voyage, bring about a dead-lock which shall tie up the ship so that an Admiralty Court will have to do for the parties what they ought to do for themselves; but this Court ought not to anticipate or attempt to provide against such a necessity.

Another question of very great interest, bearing on the nature of this action, was raised in this case. Upon the trial Captain Bartlett was admitted as a party respondent, and he joined in the answer denying the main facts on which the right to the relief prayed for was based. The respondents offered to show that Captain Bartlett had an equitable interest in the quarter of the ship held by the libellants, Lord and Morse & Co., being the same quarter taken in their names for $\frac{1}{8}$ th each, and subscribed for upon the building contract, in accordance with the agreement between Bartlett and Lord and Morse & Co., hereinbefore recited, and dated June 19, 1876.

It was not conceded by the learned counsel for the libellants that Bartlett had such an equitable interest in the quarter of the ship; but, on the contrary, it was claimed by him that the agreement of June 19 was an agreement to sell and convey an interest of Lord and Morse & Co. to Bartlett, on certain conditions, and not an agreement to hold as collateral and by way of security an interest belonging to Bartlett; and it was also claimed that, the time having expired within which Bartlett was to make his payment of one-half of the price, and notice having been thereupon given by Lord and Morse & Co. that his right under the contract was forfeited, such equitable interest had been cut off.

The Ship Annie H. Smith.

As to the question whether Bartlett has a redeemable interest in the quarter of the ship, it is only necessary for me to say that I have come to the conclusion, as well from the terms of the agreement of June 19, 1876, as from the other evidence of the understanding of the parties, their correspondence, their acts, and their testimony, that the relation between Bartlett, and Lord and Morse & Co. was that of debtor and creditor, and not that of vendee and vendor; that the interest was held as his, as collateral security for the debt, and therefore was not extinguished by the notice, but that there is no immediate right to redeem, because the amount of the debt cannot yet be ascertained, and his right to redeem is subject to be cut off by a sale under the power contained in the contract.

Aside from this answer made by the libellants' counsel as to Bartlett's interest, it was also insisted that the evidence was incompetent, on the ground that in this action the Court could consider and take notice only of the legal and record title to the ship; that as, in actions of possession, the Court would take no notice of equitable interests, but would decree possession of the ship to those holding the majority of the legal title, so here those having a moiety of the legal title were entitled as of right to a sale, if the essential disagreement between the owners of the two moieties of the legal title existed. The evidence was admitted on the ground, that this power of the Court is one to be exercised in its discretion, and with a regard to all the circumstances of the case, and with a view to the effect of the sale on the interests of all concerned, and that it is not a fixed legal right of moiety owners of the legal title, to have a sale decreed upon presenting to the Court a case of disagreement as to the employment of the ship.

It is true the legal title to the major part carries with it the right to the possession of the ship, and that right must be

NEW YORK,

session, and the rule
commerce in the sim-

There seems to be
the possession as an
, and a right to have
ident to legal owner-
vable as a personal

right inhering in a
der a sale, it is easy

most injurious to the
which it would be
as, if the right is ab-

he Court could add

If it appeared ever

and the respondents

the ship, and the state

could be found, and

at the disagreement

for almost nothing,

their property, yet, on

with all the absolute

the legal title, and

any consent of parties,

since that would

right. Unlike the

in the legal title to

decree of sale would

by rendering inse-

this power seems to

from the necessity

to the public in-

through the sea, as to pri-

The Ship Annie H. Smith.

vate interests that the parties may recover the beneficial use of their property. From the nature of the power, to be beneficial in its exercise, it should be used with discretion, with caution, and upon a careful consideration of all those interests, public and private, involved. It should not be tolerated that the power be invoked for purposes of oppression. It follows, that the Court must receive evidence of all the circumstances that may possibly affect its discretion.

If it appears that the libellants really hold their moiety in trust for the respondents, owing them a duty to follow their directions in the management of the ship, it would hardly be a proper exercise of the power to grant the prayer of the libellants against the protest of the respondents; and in such a case, even if the public interests might suffer to the extent of having one ship idle, that would be more tolerable than to do so great a private wrong. Whether the protection of Captain Bartlett's interest from the ruinous effect of a sale, if his interest be such as he claims, would be a sufficient ground for withholding the decree, if the libellants were otherwise entitled to it, it is unnecessary to decide. But the evidence was properly received as evidence of circumstances bearing on the exercise of the discretion of the Court.

Libel dismissed with costs.

For libellants, *R. D. Benedict*.

For respondents, *W. W. Goodrich* and *W. R. Beebe*.

The Barkentine Lizzie Merry.

OCTOBER, 1878.

THE BARKENTINE LIZZIE MERRY.

POSSESSION.—MASTER'S INTEREST.

By the agreement made for the building of a vessel, it was agreed that one L., who took an eighth of the vessel, should command and sail her as master. L. afterwards sold his eighth to K., who bought it, expecting to go as master of her, and gave a larger price for the share on that account. After his purchase, one-half of the vessel was owned in Damariscotta, Me., and the other half in Portland, Me. He ran the vessel as master for several voyages; and, the vessel being in New York, he was informed by her agent there that one of the Portland owners had sold out, and that the new purchaser with the Damariscotta owners had joined in appointing M. as master of the vessel. Thereafter M., coming to the vessel when K. was not on board, took possession of her. When K. came to the vessel and found M. on board, there was hard language between them and M. threatened to have K. arrested. Thereupon K. filed a libel for possession, claiming that he was entitled to be master of the vessel and had been forcibly dispossessed:

Held, That K. did not purchase from L. any right to continue as master;

That the right which L. had to sail the vessel as master was neither by the terms of his agreement nor by its own nature transferable, being a contract resting in personal confidence;

That, under the agreement between K. and the other owners, and under section 4250 of the Revised Statutes of the United States, the majority of the owners had the right to remove K. and appoint M;

That there had been no forcible dispossession of K.; that what took place between K. and M., after M. had taken possession, was immaterial and that the libel must be dismissed.

CHOATE, J. The libellant, Howard B. Keazer, who is owner of five thirty-seconds of the vessel, and from December, 1875, to the 23rd day of August, 1878, had been her master, brings this suit against the vessel and the other owners to recover possession of the vessel and to be reinstated

The Barkentine Lizzie Merry.

in his position as master. He alleges in his libel that one Lawrence was an original owner of four thirty-seconds in the vessel, and contracted for building it, and that it was agreed between Lawrence and the other owners "that he should sail and control said vessel as master and that his interest should be a master's interest and transferable as such;" that in December, 1875, the libellant purchased this interest of Lawrence with the consent and concurrence of the managing owners, and that it was agreed that he should be master so long as he held said interest, and that the other owners have acquiesced therein; that he thereupon became master and has ever since remained such, and that no complaint has ever been made of his conduct as master, and that he has in everything managed the vessel for the best interests of all concerned; that on the 29th of August, 1878, he was forcibly dispossessed of said vessel by one J. F. S. Merry, who claims to have been appointed master.

A majority in interest of the owners appear as claimants and deny the material averments of the libel in respect to the alleged agreement with the libellant. They also deny the forcible dispossession, and allege that Merry is the duly appointed master of the vessel.

The evidence wholly fails to sustain libellant's claim of the alleged agreement either with Lawrence or with himself. Under the agreement with Lawrence, which was in writing, no right is given to Lawrence to transfer, with his share in the vessel, his right to command her. It contained an agreement that he should command and sail the vessel, but that right is not by the terms of the agreement, nor by its nature, transferable. On the contrary, it is a contract in its nature resting in personal confidence and strictly personal. The evidence also does not show any agreement on the part of the other owners with the libellant, at the time of his pur-

The Barkentine Lizzie Merry.

chase, that he should continue to command the vessel so long as he held this interest. He bought, and was encouraged to buy, the interest formerly held for the benefit of Lawrence, in the expectation that he would be appointed master, as indeed he was, and he gave for it a larger price than the share was worth to anybody else, because he expected to be master; but nothing took place between the parties impairing in any way the rightful authority of the majority in interest at any time to displace him and appoint another master. The case is also within the provisions of section 4250 of the Revised Statutes, which provides that "any person or body corporate having more than one-half ownership of any vessel, shall have the same right to remove a master, who is also part-owner of such vessel, as such majority owners have to remove a master not an owner. This section shall not apply where there is a valid written agreement subsisting, by virtue of which such master would be entitled to possession, nor in any case where a master has possession as part-owner obtained before the 19th day of April, 1872." The alleged contract with the libellant was not in writing, and, therefore, if proved, would not avail him. There was then no legal claim on the part of the libellant, nor any reasonable pretence of such legal claim, that he held his position of master except subject to the will of the majority of the owners. On the 23rd day of August, he was informed by the agent of the majority of the owners, that Merry had been appointed master in his place. He well knew how the title was held. Up to a short time before that day, half the vessel had been owned in Damariscotta, and half in Portland, Maine. He had been informed that one of the owners known as a Portland owner, had sold out to one of the Damariscotta owners, and that this interest united with the half-interest already held by the Damariscotta owners, to change the master. He

The Barkentine Lizzie Merry.

does not appear to have objected then that the majority had not joined in this proceeding, but he took the ground that under his master's interest he was entitled to hold the command. I am satisfied with the proof as to the majority having joined in the appointment of the new master. Whatever question might be made as to the execution of the first power of attorney, upon which the name of John F. Stinson appears, a second power was shown to have been given, acknowledged before a notary, and put in the hands of the agent of the owners before he communicated their action to the libellant. After the libellant was informed that a new master had been appointed, and while he was absent from the vessel, the new master came to the vessel and took possession. The evidence does not show that any force was used, or threatened on his part, to obtain possession. If there was anybody on board holding or claiming to hold any authority from the libellant to resist the new master, or to prevent his taking possession peaceably, that person has not been called; nor is there any evidence, whatever, of anything that took place between him and the new master when the latter came on board and assumed command. There is no proof, therefore, of any forcible dispossession. Afterwards, the libellant came and found the new master in possession, and some hard language was used, the libellant insisting on his right, and the new master insisting on his, and threatening an arrest if disturbed; but the possession of the ship was already changed, and this affair is wholly immaterial.

The libel is dismissed with costs.

For libellant, *Beebe, Wilcox & Hobbs.*

For claimants, *R. D. Benedict and H. T. Wing.*

The United States v. The New York, New Haven and Hartford R. R. Co.

OCTOBER, 1878.

THE UNITED STATES VS. THE NEW YORK, NEW
HAVEN AND HARTFORD RAILROAD COMPANY.

JURISDICTION.—INTERNAL REVENUE.

Under U. S. Rev. Stat., § 733, which is a re-enactment of the 41st section of the Act of June 30, 1864 (13 Stat. at large, p 239), as amended by the 9th section of the Act of July 18, 1866 (14 id. p. 111), and which provides that "taxes accruing under any law providing internal revenue may be sued for and recovered, either in the district where the liability for such tax occurs or in the district where the delinquent resides," a suit will not lie to recover such tax in a district other than that in which the tax accrues or that in which the delinquent resides, although he may be found and served with process therein.

CHOATE, J. This is a suit brought to recover a tax alleged to have accrued against the defendant, a railroad corporation, in the year 1864, under the act of June 30, 1864. (13 Stat. at Large, p. 275.) The defendant pleads to the jurisdiction that the tax, if any is due, accrued in the District of Connecticut, and that the defendant is not a New York corporation, but incorporated under the laws of Connecticut, and not a resident of this district. To this plea the plaintiff demurs.

The question raised is whether a suit for this tax can be brought in a district, other than that where the defendant resides or where the tax accrues, or whether it can also be brought in the district where the defendant shall be personally served. It is conceded by the learned counsel for the defendant that under the judiciary act of 1789, ch. 20, § 11 (Rev. St. § 739), which prohibits the bringing of a civil suit against an inhabitant of the United States "in any other dis-

The United States v. The New York, New Haven and Hartford R. R. Co.

strict than that of which he is an inhabitant, or in which he is found at the time of serving the writ," a corporation may be sued out of its domicile, if found in another district ; and the defendant does not contend that this defendant was not "found" within this district within the meaning of that section. The claim of the defendant is that by *Rev. Stat.* § 733, the plaintiff is restricted to the district where the tax accrues and the district where the defendant resides for the purpose of this action. That section is as follows : "Taxes accruing under any law providing internal revenue, may be sued for and recovered either in the district where the liability for such tax occurs, or in the district where the delinquent resides." In the absence of any statute regulation as to the courts where such a suit is to be brought, no doubt the United States could sue in any district where the defendant could be found. And it is argued on behalf of the plaintiff that the language of section 733 is permissive, merely, and not restrictive, the words being "*may be sued for*," etc., and that the section adds another district in which the suit may be brought, namely, that in which the tax accrues, to those in which under the general terms of section 739 it could otherwise alone be brought, namely, those in which the defendant resides or can be found. Section 733 is a re-enactment of part of the 41st section of the Act of June 30, 1864 (13 Stat. at Large p. 239), as amended by the 9th section of the Act of July 13, 1866 (14 Stat. at Large p. 111).

The Act of 1864 ch. 173, § 41, provided as follows : "That it shall be the duty of the collectors aforesaid or their deputies, in their respective districts, and they are hereby authorized, to collect all the duties and taxes imposed by this Act, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by virtue of this Act, and all fines, penalties and forfeitures which

The United States v. The New York, New Haven and Hartford R. R. Co.

may be incurred or imposed by virtue of this Act, shall be sued for and recovered in the name of the United States in any proper form of action, or by any appropriate form of proceeding, *qui tam*, or otherwise, before any Circuit or District Court of the United States, for the district within which said fine, penalty or forfeiture may have been incurred, or before any other court of competent jurisdiction." It will be observed that under this statute no special provision was made as to the district in which suits for taxes should be brought; such suits were therefore liable to be brought and could be only brought in the district where the defendant resided or in the district where he was found, while suits for fines might be brought in the district where the fine was incurred, and also "in any other court of competent jurisdiction," which included certainly a Circuit or District Court of the United States for the district where the offender might be found. Section 41 of the Act of 1864 was amended by the Act of 1866 so as to read as follows: (p. 111) "That it shall be the duty of the collectors aforesaid, or their deputies, in their respective districts, and they are hereby authorized to collect all the taxes imposed by law, however the same may be designated, and to prosecute for the recovery of any sum or sums which may be forfeited by law; and all fines, penalties and forfeitures which may be incurred or imposed by law shall be sued for and recovered in the name of the United States in any proper form of action or by any appropriate form of proceeding, *qui tam* or otherwise, before any Circuit or District Court of the United States for the district within which said fine, penalty or forfeiture may have been incurred, or before any other court of competent jurisdiction. And taxes may be sued for and recovered in the name of the United States in any proper form of action before any Circuit or District Court of the United States for the district within which the liability to

The United States v. The New York, New Haven and Hartford R. R. Co.

such tax may have been or shall be incurred, or where the party from whom such tax is due may reside at the time of the commencement of said action." A provision as to suits for fines, penalties and forfeitures differing only in some unimportant respects was also made by the 179th section of the Act of 1864 (13 Stat. at Large p. 305), in connection with a provision imposing on collectors the duty of collecting such fines, etc. And this also was verbally amended by the Act of 1866 (14 Stat. at Large p. 145), but not in any particular varying its terms in respect to the courts having jurisdiction of suits and proceedings therefor.

A comparison of these two statutes shows, I think, that the purpose of amending the statute was to restrict the plaintiff in a suit for taxes to the two districts, that in which the tax accrues and that in which the defendant resides. Some change in the mode of collecting fines or taxes was intended by this amendment. In the original Act the collectors are required to collect taxes, but no court was specified to which they are to resort. In the amending Act, fines are still to be sued for in the Circuit or District Court of the United States, for the district where the fine is incurred or in any other court of competent jurisdiction, the same as before. The change made is, by adding the provision as to taxes, that suits may be brought in the district where the liability for the tax is incurred *or in the district where the defendant resides*. Now if the purpose of this amendment had been merely to allow the United States to sue for a tax in the district where the liability was incurred, that purpose would have been well expressed by simply providing that the suit *may* be brought in that district. The language being in form permissive only, the United States would seem not, by that language, to be restricted from suing in any other district in which, by the existing law, it could already sue, namely, the district where

NEW YORK.

and Hartford R. R. Co.

he may be found;
as claimed on the
new right as to the
party, etc., resides,"

They are unneces-
sary already existed;
alternative right to
that it was intended to
alternative right, is only
The words are not
have been used as
possible construction that
the tax accrues was
place in which suit
added words were in-
tended is obviously not the
only express a distinct
right as to the place in
sight as then existing
defendant resides, the
that words thus intro-
duced by amendment, must
be construed and to have some
construction that can be put
upon them any sensible
are restrictive, limiting
the defendant resides,
that they were intend-
ed place of such suits.
any proper force or to
the statute on any
ground to this view by the
as to fines, the other

The United States v. The New York, New Haven and Hartford R. R. Co.

as to taxes. In the one the language used in the alternative to the new right given, is "any other court of competent jurisdiction," which includes the district where the offender can be found. Immediately follows the provision as to taxes. And different language is used for a similar alternative provision. It must be assumed that this difference of language was intended, and that the purpose had in view in using the expression employed as to suits for taxes would not have been effected by using the same language adopted as to fines. Such marked differences in language used for a similar purpose in the same Act and the same section, cannot be held to have been accidental.

Moreover, it may well have been thought that the privilege given to the government to sue for a tax in the district where the tax accrues, and in the district where the defendant resides, afforded ample and convenient means of collecting the tax, and that it was unnecessary to preserve the right to sue, also, in the district where the defendant may be found. There seems to be nothing unreasonable in this arrangement as to suits for taxes, while as to suits for fines, penalties and forfeitures it has been thought wise to preserve to the government all existing rights to sue, while specially granting the new right to sue where the fine, penalty or forfeiture was incurred.

These provisions of the Act of 1866 were embodied in sections 732 and 733 of the Revised Statutes with a change of form, but hardly of substance, as to suits for fines. Section 732 provides that suits for fines, etc., may be brought in the district where they accrue or in the district where the offender is found. And by section 733, as above cited, suits for taxes may be brought in the district where the tax accrues, or in that where the defendant resides. Thus the revisers appear to have indicated their understanding that the dis-

The Steamboat City of Hartford.

inction in the Act of 1866 was an intended difference in the two cases, by preserving the same distinction of language in the revision. Certainly this re-enactment detracts nothing from the reasons in favor of holding that the words were used in a restrictive sense in the Act of 1866. And the presumption is against any change being intended by the substantial re-enactment of these two clauses taken from that section of the Act of 1866, in these two sections of the Revised Statutes.

Demurrer overruled and judgment for defendant.

For the plaintiff, Assistant U. S. District-Attorney *Hill*.

For the defendant, *H. C. Robinson*.

Eastern District of New York.

OCTOBER, 1878.

THE STEAMBOAT CITY OF HARTFORD.

RATE OF WHARFAGE AT BULKHEAD.—COSTS.

A steamboat, 272 feet long, occupied a berth at a bulkhead in the city of New York for 28 days. The bulkhead was owned by three parties. B. owned one hundred feet of it, all of which was occupied by the steamboat or by lines which ran from her bow forward to a pile at the corner of the bulkhead. F. owned the hundred feet next, all of which was occupied, and K. owned one hundred and fifty feet next, seventy-five feet of which was occupied. The rate of wharfage which, by the statute of the State of

The Steamboat City of Hartford.

New York, the steamboat would be called on to pay for a single berth was \$9.50 a day. B. filed a libel, claiming to recover of her for wharfage \$9.50 a day. The owners of the steamboat claimed that he was only entitled to his proportionate share of the \$9.50 a day and tendered and paid into court \$89.22:

Held, That the libellant was not entitled to recover \$9.50 a day, but only his proportionate share of that sum, viz., $\frac{1}{17}$ of it, and without costs.

BENEDICT, J. This is an action to recover wharfage. The material facts are not in dispute and are as follows :

For a period of twenty-eight days in November, 1877, the steamboat City of Hartford occupied a berth at the bulkhead between Bank and Bethune streets, in the North River, while undergoing some repairs.

The rate of wharfage to be paid by vessels using wharves and piers in the cities of New York and Brooklyn, is regulated by a statute of the State of New York, which provides: "It shall be lawful to charge and receive, within the cities of New York and Brooklyn and Long Island City, wharfage and dockage at the following rates, namely: From every vessel that uses or makes fast to any pier, wharf, or bulkhead, within said cities, or makes fast to any vessel lying at such pier, wharf or bulkhead, or to any other vessel lying outside of such vessel, for every day or part of a day, as follows: From every vessel of 200 tons burden and under, two cents per ton, and for every vessel over 200 tons burden, two cents per ton for each of the first 200 tons and one-half of one cent per ton for every additional ton, except canal-boats, etc., *

* * * but every other vessel making fast to a vessel lying at any pier, wharf or bulkhead, within said cities, or to another vessel lying outside of such vessel, or at anchor within any slip or basin when not receiving or discharging cargo or ballast, one-half the first above rates; and from every vessel or floating structure, other than those above

The Steamboat City of Hartford.

named or used for transportation of freight or passengers, double the first above rates, except that floating grain elevators shall pay one-half the first above rates ; and every vessel that shall leave a pier, wharf, bulkhead, slip or basin without first paying the wharfage or dockage due thereon, after being demanded of the owner, consignee, or person in charge of the vessel, shall be liable to pay double the rates established by this Act."

At the rate fixed by this statute \$9.50 per day would be the sum the City of Hartford would be liable to pay for an inside berth.

There were three different persons each of whom owned a portion of the bulkhead at which the steamboat lay. The length of the water-front thus occupied which belonged to Brainard the libellant was 100 feet. The whole of this portion of the bulkhead may properly be considered as having been used by the steamboat, the lines from her bow extending to a spile at the corner of the libellant's portion, for although there was a small space between the bow of the steamboat and the adjoining pier, that space was not only covered by the lines so as to prevent its use by any other vessel, but was also too small to be used by any other craft.

Next south of the libellant's portion of the bulkhead for a distance of 100 feet, one Fagan owned the bulkhead. The steamboat was 272 feet long, and, of course, she covered all of Fagan's portion, so as to prevent its being used as a berth for any other vessel. Lines ran from the steamboat to Fagan's portion as well as to the libellant's portion. Next south of Fagan's portion for the space of 150 feet, the bulkhead was owned by one Keenan. Keenan has been paid for the use of 75 feet of his bulkhead by this boat, and the evidence shows that, at least for that distance, the bulkhead of Keenan was substantially used. To this part as well as to

The Steamboat City of Hartford.

the libellant's part, ingress and egress was had by those on the boat, and lines ran from the boat to spiles thereon.

Upon these facts the libellant claims to be entitled to \$9.50 per day for the use of his portion of the bulkhead; while the claimant insists that \$9.50 per day is the whole sum chargeable upon the boat for the whole berth, and that the libellant is entitled to a part of that sum proportionate to the extent of his bulkhead which was opposite to the hull of the steamboat as she lay in the berth. I cannot agree with either of these positions. As to the claim of the libellant to be paid \$9.50 per day for use of his bulkhead, I have no difficulty. It is impossible to suppose that the statute intended to allow every owner of a part of a bulkhead to charge for the use of his water-front the full amount of wharfage prescribed by the statute for a full berth, without any regard to the amount of water-front used. Such a construction of the statute would compel a vessel to pay full wharfage to several different persons whenever the frontage used belonged to different persons; and this boat would be compelled in this instance to pay three wharfages, that is \$28.50 per day, and if the owners of this bulkhead had happened to number thirty, instead of three, according to such an understanding of the law the liability would be \$285.00 per day. Such can not have been the intention. The meaning of the statute is that a boat shall pay the amount provided by the Act and no more for her berth. This charge for a berth being required to be calculated by the tonnage, of course the amount of wharfage increases with the size of the boat; but it is a single charge for a single berth. It follows that when the berth used is owned by different persons, the statutory charge must be justly apportioned among the several owners. The claim made by the libellant to be entitled to \$9.50 for each day this boat lay at his pier is therefore rejected.

The Steamboat City of Hartford.

The remaining question is how to apportion the wharfage chargeable by the statute for the berth among the various owners. The claimant's view is that only that part of the bulkhead against which the boat actually lay was used by the boat, and in accordance with this view he has tendered and paid into court the sum of \$89.22. But upon the evidence the boat substantially appropriated to her own use for her berth at this bulkhead an extent of water-front exceeding her own length by some few feet. She required for her berth, and substantially appropriated, 275 feet of the bulkhead, of which 100 feet belonged to the libellant. A just division of the legal wharfage allowed for the whole berth would therefore be to give to the libellant $\frac{100}{275}$ of the gross sum. This would be equity.

According to this mode of division the libellant is entitled to the sum of \$95.66. The claimant has tendered only the sum of \$89.22, and the libellant must, therefore, have a decree for the sum of \$6.44. But I give no costs, because the question is novel, and the evidence shows a desire on the part of the claimant to pay without suit all that was legally chargeable.

It has been contended that the decision in the case of *The Virginia Rulon* (13 Blatch. 519) is adverse to the foregoing conclusion and in favor of the claim made by the libellant. But the distinction between the two cases is this: The *Virginia Rulon* occupied and used two berths, one at the pier and one on the bulkhead, and discharged cargo on both the pier and the bulkhead at the same time. In such a case, —and others might be imagined— the vessel is considered as using two berths and for that reason chargeable with lawful wharfage for each. The present is a different case, because here the vessel occupied only the space necessary to give her a berth, and that space was along the water-front of a con-

The Yacht Countess of Dufferin.

tinuous bulkhead. She used no more than was necessary, if she was to have a berth at all, and therefore occupied but a single berth.

The view I have taken of this case disposes of the claim for double wharfage based on the provision of the statute, that when the vessel leaves the wharf without paying her wharfage after demand made, she is liable to double wharfage; because the only demand ever made by the libellant was at the rate of \$9.50 per day. As he was only entitled to \$3.07 per day, such a demand was properly refused and does not entitle the wharfinger to double wharfage.

Let a decree be entered in accordance with this opinion.

For the libellant, *Gale & Chalmers.*

For the claimant, *D. & T. McMahon.*

OCTOBER, 1878.

THE YACHT COUNTESS OF DUFFERIN.

SEAMAN'S WAGES.—WAIVER OF LIEN.—PRESUMPTION.—LEX CONTRACTUS.

C. signed shipping articles at Cobourg, Canada, to go on board of a yacht as sailing master, on a voyage to Philadelphia, at a rate of wages of \$1 a day. Subsequently, but on the same day, an agreement was made between C., G. and B., which, after setting forth that C. had begun to build the yacht, but had not been able to finish her, and had put the title in G., provided that G. should hold the yacht in trust for C., B. and G. himself; that G. should manage her, and after she had gone to New York and Philadelphia, should sell her, and from the proceeds, after paying all debts due, should pay certain sums to B., C. and himself, and that C. should go as sailing master at

The Yacht Countess of Dufferin.

\$60 a month. The yacht having come to New York, C. filed a libel against her for wages:

Held, That the right of C. must be governed by the agreement and not by the articles;

That under that agreement C. must be held to have waived any right of lien on the vessel for wages;

That as the vessel was a foreign vessel and the contract was made in a foreign port, Section 4535 of the U. S. Revised Statutes could have no effect in the case;

That the court could not presume that the statutory law of the Dominion of Canada is the same as that of the United States.

In the absence of any evidence as to the law of the place where the contract was made and to be in a substantial part performed, the law maritime will be presumed to be the law controlling the mariner's contract. By that law it is competent for the mariner, by his agreement understandingly made in a proper case, to waive his lien for wages.

BENEDICT, J. The agreement made with the libellant subsequent to the shipping articles, is the agreement according to which the libellant's right to proceed against this yacht for his wages as the sailing master thereof must be determined. The contract of the shipping articles, if subsisting, would not avail him, as at the rate of wages stated in the shipping articles he has been overpaid. The subsequent agreement was entered into by the libellant as a part-owner in the vessel for the purpose of enabling the vessel to be finished and to run races at New York and Philadelphia, in which races she was to be sailed by the libellant. By the agreement it was stipulated that the libellant should be sailing master at \$60 per month. No limit whatever is assigned to the length of the employment, either by reference to any voyage or voyages, or to any period of time. According to the agreement, the libellant was at liberty to leave the vessel certainly at the end of the first month. The agreement creates a trust for the benefit of the libellant and others, and it cannot be supposed that any of the parties contemplated

The Yacht Countess of Dufferin.

that the libellant, in case he should leave the vessel at the termination of the month or at any other time, should have the right to proceed against the vessel to enforce a lien for his wages, and so put an end to the adventure. The nature and object of the agreement are inconsistent with the right of lien claimed by the libellant, and that right must be deemed to have been waived by the execution of the new agreement made subsequent to the shipping articles upon which alone his right of action rests. Section 4535 of the Revised Statutes can have no operation here, as this was a foreign vessel and the contract made in a foreign port.

The court can not presume that the statutory law of the Dominion of Canada is the same as the United States statutory law declared in section 4535. (Greenleaf's Evid. Vol. 1, § 488. *Cutter v. Wright*, 22 N. Y. 481.)

In the absence of any evidence as to the law of the place where the contract was made and to be in a substantial part performed, the law maritime will be presumed to be the law controlling the mariner's contract. By that law it is competent for a mariner by his agreement understandingly made in a proper case to waive his right to proceed against the vessel for his wages.

The libel must be dismissed, and with costs.

For the libellant, *Benedict, Taft and Benedict*.

For the claimant, *Scudder & Carter*.

Southern District of New York.

NOVEMBER, 1878.

THE BARGES ENERGY AND M. F. WINCH.

IMPROPER MOORING.—VESSELS AT PIER.—ICE.

The steamboat W. was moored outside of another steamboat, the O., alongside of a pier at Hoboken, other steamboats lying astern of them. All the steamboats were laid up for the winter, the W. being securely fastened to the O. and the pier. The owner of two barges, desiring to take them up into the slip to lie up, and not being able to do so on account of ice, made them fast for the night alongside of the W., being told to moor them there by a harbor-master who was not shown to have any official authority as to the mooring of vessels. At that time it was known that, with a flood tide and an easterly wind, ice was liable to come into the slip with great force. During the night, the tide being flood, and the wind easterly, the ice did come in, and carried the barges, and the two steamboats alongside of which they lay, away from the pier and against the steamboats lying astern, and the W. was injured by such collision :

Held, That the injury did not arise from inevitable accident ;

That the barges were not properly moored to guard against a danger which was then to be apprehended ;

That the injury to the W. resulted from the mooring of the barges alongside of her and that they were liable for the damages.

CHOATE, J. This is a libel brought by Henry B. Crossett, the owner of the steamboat Wyoming, against two ice barges, the Energy and the M. F. Winch, for damages alleged to be caused by the improper and insecure mooring of the barges by the side of the Wyoming. It appears by the evidence that on the 18th day of January, 1876, the steamboat Olyphant was moored on the south side of South Fifth street pier, Hoboken, lying with her bow towards the

The Barges Energy and M. F. Winch.

North River, and some distance inside the head of the pier. The Wyoming was moored outside of the Olyphant, and astern of the two steamboats were two other steamboats, the Syracuse and the Austin, with a space between the sterns of the forward boats and the bows of the others of eight or ten feet. These steamboats were laid up for the winter and were properly and securely fastened to the pier, the Wyoming being fastened to the Olyphant and to the pier. The weather had been severe, and ice had been running in the North River and crowding into the slip the night before. On the afternoon of the 18th of January, the ice barges Energy and Winch were brought to the pier and moored alongside of the Wyoming. They were not quite as long as the Wyoming, but stood much higher out of the water, presenting to the wind a much larger surface. The Energy was laid alongside of the Wyoming with her bow towards the river and her stem about on a line with the stem of the Wyoming. The Winch was laid alongside of the Energy, her stern being out and about on a line with the stem of the Energy. The Energy was securely fastened to the Wyoming, and the Winch to the Energy, by breast lines and spring lines, and there were lines from the Energy to the Austin and Syracuse, but there was at first no line from either of the barges forward to the pier. In the evening and after the man who superintended the mooring of the barges had left, at the suggestion of the shipkeeper on the Austin, a line was run from the bow of the Energy across the bows of the Wyoming and the Olyphant to the pier and there fastened to a spile. About two o'clock in the morning, the wind being about south-east and blowing a fresh breeze, and the tide flood, the ice which filled the river half across to the New York shore was driven into the slip, against the port quarter and stern of the Winch, and the bows of the Energy,

The Barges Energy and M. F. Winch.

Wyoming and Olyphant with great force, and the lines between the Wyoming and Olyphant and between them and the pier gave way, and all four vessels were driven back into the slip with such force that the sterns of the Wyoming and Olyphant coming in contact with the bows of the Austin and Syracuse, tore them from their moorings and crowded them back and threw their bows out from the pier and separated them from each other, and about 30 or 40 feet of the joiner work aft on the port side of the Wyoming and the rail and joiner work on the starboard side of the Wyoming were crushed in and broken. The bows of the four vessels were driven in together towards the pier, and the upper works of the Wyoming on the port side were thus injured by grinding and crowding against the Olyphant, and the rail and joiner work aft by being driven against the other steamboats. The fastenings between the barges and those between the Energy and the Wyoming did not give way, and the line between the bow of the Energy and the pier either slipped, or was slackened up by the crowding of the bow of the Energy towards the pier.

The situation at the time these barges were moored required the greatest caution in securing them. The danger from the ice was imminent and well known to the parties who brought these barges to this place. It was well known that upon the flood tide, and especially with an easterly wind, the ice was liable to come in to this slip with great force. It hardly needs any evidence to show that the risk of damage from the ice to the steamboats moored at the pier would be greatly increased by having the two barges moored alongside of them, especially if they presented, as they did, a much larger surface to the wind than the steamboats; and the evidence is conclusive not only that the risk was increased, but that the barges were not properly nor securely moored as

The Barges Energy and M. F. Winch.

against this danger. There should have been lines leading from the barges to the pier both forward and aft, or forward to the pier and aft to the steamboats astern, so as to hold the barges without trusting to the fastenings between the barges and the steamboats, and to relieve the fastenings, by which the steamboats were held, from the increased strain caused by the barges being there. The line that was put out to the pier was of little or no use. It did not lead forward. It was no protection against a force applied in front and tending to crowd the barges further back into the slip. What happened was the natural consequence of the way in which the vessels were moored. It is obvious that with the two barges firmly secured to the Wyoming, the force of the ice and wind to cause the Wyoming and the Olyphant to work upon each other and to strain the fastenings between them and the pier, and between themselves, was greatly increased. That force was applied upon a different part of the Wyoming, at a higher level than it would have been if the barges had not been there. It was also applied with an increased weight and greater leverage.

It is claimed by the owners of the barges that there was no mooring pile on the pier to which they could have carried a line further forward than they did. This is clearly no excuse. The Wyoming was under no obligation to furnish them a mooring place, and if they could not safely moor there they should not have gone there at all. It is also no excuse that a person called a harbor master told them to moor alongside of the Wyoming. He is not shown to have had any official authority to direct the laying of these barges by the steamboats, so as to excuse those in charge of the barges from securing them properly and with safety to the Wyoming.

In the matter of Martin L. Sykes.

It is not made out by the evidence that the injury done was inevitable or would have been sustained if the barges had not been there.

It appears that the purpose of those having the barges in charge was to lay them up for the winter, further inside the slip, but they were prevented from getting them further in that day by the ice in the slip. Accordingly they tied up by the Wyoming as they did, thinking that that would do for the night, intending the next day, or as soon as the ice inside broke up, to take them further in. They are clearly responsible for the damage done. The claim of the libellant is sustained by the cases of *Van Tine v. The Lake*, 2 Wallace Jr. 52; *The Johannes*, 10 Blatch. C. C. 478; *The Louisiana*, 3 Wall. 164.

Decree for libellant with costs, with reference to compute damages, etc.

For the libellant, *D. & T. McMahon*.

For the claimants, *W. W. Goodrich*.

NOVEMBER, 1878.

IN THE MATTER OF MARTIN L. SYKES.

WITNESS.—CONTEMPT OF COURT.—COMPULSORY PRODUCTION OF BOOKS AND PAPERS OF CORPORATIONS.—FOREIGN CORPORATION.—POWERS OF OFFICERS.—WHAT BOOKS AND PAPERS TO BE DEEMED "IN CUSTODY" OF OFFICER.

A foreign railroad corporation, organized under the laws of Illinois and other States, having its principal office in Chicago, had an office in New York, where certain books and papers were kept under the control of the Vice-

In the matter of Martin L. Sykes.

President, who was also the secretary and treasurer of the corporation. By the established practice of the corporation, these books and papers when no longer required here for present use were sent to the Chicago office. The secretary being served with a *subpœna duces tecum*, in an action pending in this court, requiring him to produce some of these books and papers which had been so forwarded to the Chicago office four years before the service of the *subpœna*, failed to produce the same; and it appeared on his examination that the officer at Chicago, the assistant secretary, who had the immediate charge of the books and papers, was a co-ordinate officer, not under the control and direction of the witness, and that, by the by-laws of the company defining the powers of its officers and by the practice of the corporation, the witness could not command the delivery to him of the books and papers to be produced in obedience to the *subpœna*, although they probably would be sent to him at his request as required for use by him in the business of the corporation. The by-laws provided among other things, that the secretary should "safely keep all documents and papers which shall come into his possession" and "truly keep the books and accounts of the company appertaining to his office, so as at all times to show the real condition of the company's affairs," and should also keep the stock books and surrendered certificates of stock. And the laws of Illinois (Rev. Stat. of Illinois, p. 283, § 13), required correct books of account of all the business of the corporation to be kept at its principal office, subject to the inspection of its stockholders. Upon motion to punish the witness as for contempt in not producing the books and papers:

Held, That the same were not *in his custody* within the meaning of section 868 of the N. Y. Code of Civil Procedure, which provides that "the production upon a trial of a book or paper belonging to or under the control of a corporation may be compelled in the like manner as if it was in the hands or under the control of a natural person" and that "for that purpose a *subpœna duces tecum*, or an order as the case requires, must be directed to the president or other head of the corporation or the officers thereof *in whose custody* the book or paper is;"

That the statute relates to foreign as well as to domestic corporations;

That the statute requires the witness only to produce books and papers in his custody, and does not require him to obtain the custody of books and papers not actually in his custody, but which he is able to get into his custody in order to produce them in court.

Whether consistently with the law of Illinois these books and papers could be removed from the Chicago office, *quære*.

In the matter of Martin L. Sykes.

Whether the statute requires a witness in a court of the United States in any case to travel more than one hundred miles from the place of trial for the purpose of bringing into court books and papers in his custody beyond that distance or to take the risk of having them sent to him, if beyond that distance, without going for them personally, *quere*.

CHOATE, J. In this case of the United States v. Samuel J. Tilden, which has been noticed for trial at the present term, one Martin L. Sykes has been subpoenaed as a witness for the plaintiffs under a *subpœna duces tecum* directing him to produce certain stock ledgers of the Chicago and Northwestern Railroad Co., also the stock ledger and book of the minutes of the meeting of the directors of the Peninsular Railroad Company, and certain vouchers and receipts for payments of money to the defendant or to one Smith for him by the Chicago and Northwestern Railroad Co. for services as trustee from 1861 to 1873. Upon the first day of the term the witness appeared, but did not bring with him the books and papers described in the subpoena, whereupon an order was granted against the witness, ordering him to show cause why he should not be punished for a contempt in disobeying the subpoena. Upon the return day of the order the witness appeared and presented an affidavit to the effect that he is Vice-President of the Chicago and Northwestern Railroad Co., that said company is a corporation organized and existing under the laws of Illinois, Wisconsin and Michigan, having its principal offices at Chicago, that it also has a branch office at 52 Wall st., New York, kept for the convenience of transacting its eastern business, that the books and vouchers specified in the subpoena are not now and have not been for four years in his custody, that he has no authority as an officer of the company to order the said books to be brought to New York for the purpose of this case, and that he has no right to exercise any personal control over

In the matter of Martin L. Sykes.

the said books, that the president of the company resides at Chicago, that he has no knowledge of and has never seen the book of minutes of the Peninsular Railroad Company, that all vouchers of every kind for disbursements at the New York office have been returned monthly to the principal office at Chicago where they are examined and disposed of under the direction of the president, that he had upon the issue of the order to show cause against him telegraphed that fact to the general solicitor of the company at Chicago, to which he had received a reply by telegraph to the effect that he, after consulting with one Hewitt, an officer of the company in Chicago, had already refused to have any books sent to New York.

The witness was then on motion of the district attorney sworn upon his *voir dire* and the following facts appeared: The witness, besides being vice-president of the Chicago and Northwestern Railroad Co., became its secretary and treasurer in 1873 and has since continued to hold those offices. Since he became secretary in 1873, he has had charge and control of the office of the company in New York, when the president is not here. There is an assistant secretary under him in the New York office and another assistant secretary in Chicago. The stock ledgers while in current use have been and are now kept at the New York office. The stock ledgers of this company, referred to in the subpoena, were, while entries were being made in them, kept at the New York office. All the entries in the stock ledgers are made under the direction and supervision of the witness as secretary and have been so since he has held that office. The assistant secretary at Chicago is a co-ordinate officer, not under the control and direction of the witness; the entries in the stock ledgers called for by the subpoena were all made in New York and relate to transactions that took place in New York.

In the matter of Martin L. Sykes.

These stock ledgers were sent to Chicago in 1874, in pursuance of a practice, which has always obtained in this company, of sending to the central office of the company all books kept at New York, when they are filled up and cease to be in current use. The purpose of sending them there is not alone for convenience of storage, but that they may be at the central office of the company. The witness further testified that he had no reason to believe that the books would be sent to him if he sent for them; that he thought if he had occasion to use them at the office and telegraphed to that effect to the president they might be sent to him.

It further appeared that the meetings of the directors were sometimes held in New York and sometimes in Chicago; that the election of officers took place in Chicago. According to the by-laws the officers of the company include president, first and second vice-presidents, treasurer, secretary, assistant treasurer and assistant secretary. Article 5 provides that "the whole affairs of the company shall be managed and directed" by the board of directors. Article 6 provides that the president among other duties "shall have a general care, supervision and direction of the affairs of the company and of the employees, and shall have such powers and perform such duties as may from time to time be conferred upon him or be prescribed by the board of directors." Article 7 provides among other things as follows: "It shall be the duty of the secretary to safely keep all documents and papers which shall come into his possession," "and truly keep the books and accounts of the company appertaining to his office so as at all times to show the real condition of the company's affairs, and shall present statements thereof when required by the board; he shall keep books upon which transfers of stock may be made by any stockholder, or his attorney, duly constituted in writing, also a stock ledger and certificate

In the matter of Martin L. Sykes.

book, prepare new certificates upon the transfer of shares and surrender of the old certificates, and keep a register of all certificates issued." There is no by-law defining the duties of assistant secretary. The laws of Illinois provide that "it shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its principal office or place of business in this State (Illinois) correct books of account of all its business, and every stockholder in such corporation shall have the right, at all seasonable times, by himself or by his attorney, to examine the records and books of account of the corporation."

The question to be determined is whether upon this state of facts the stock ledgers and vouchers of this corporation described in the subpoena are "*in the custody*" of the witness within the meaning of § 868 of the Code of Civil Procedure, which is as follows: "The production upon a trial, of a book or paper, belonging to or under the control of a corporation, may be compelled, in the like manner as if it was in the hands or under the control of a natural person. For that purpose a subpoena *duces tecum*, or an order made as prescribed in the last section as the case requires, must be directed to the president or other head of the corporation, or to the officers thereof, in whose *custody* the book or paper is."

This section of the code, which is new, and designed to remedy a defect in the existing law, by which corporations were practically exempt from producing their books in court, is highly beneficial to the purposes of justice. There are often cases where the presence of the books themselves in court is the only way in which certain facts sought to be proved can be established, as, for instance, where it is necessary to refresh the recollection of witnesses by exhibiting to them the original entries. In such cases copies may prove

In the matter of Martin L. Sykes.

insufficient. This section should therefore have a fair and liberal construction, with a view to the purposes designed to be accomplished by it. I do not think, therefore, that it should be construed as limited to domestic corporations, as is suggested by the learned counsel for the witness. If a foreign corporation sees fit for reasons of convenience, profit or necessity, to keep books within the jurisdiction of the courts of New York, I see no reason why those books should not be equally accessible for the purposes of justice here with like books kept by a domestic corporation. The case is equally within the mischief sought to be corrected by the statute, and there is no reason in the policy of the law of New York for giving foreign corporations an exemption from the effects of this statute.

But upon the facts proved I am clearly of opinion that the books and vouchers called for are not, within the meaning of the code, "*in the custody*" of the witness.

The evidence is sufficient to show that this corporation has removed these books and papers from the New York office to the Chicago office, and that this has been done in pursuance of a standing rule of the company, making the central office of the company in Chicago the place where books not in current use and all vouchers are kept. The books and papers were effectually removed thereby from the custody of the officer in charge of the New York office, and placed under the custody of the officer or officers in charge of the Chicago office. Such a rule is a reasonable and proper regulation for a corporation to make, a part of whose business is done in foreign States. There is nothing in the by-laws to prevent the making of such a rule, nor is it necessary that it should be enacted in the form of a by-law, or passed by a vote of the board of directors. It is shown by the long-continued practice of the corporation to be the rule.

In the matter of Martin L. Sykes.

The 7th article of the by-laws does not in terms, or by necessary implication, put all the books and papers of the corporation into the exclusive custody of the secretary. He is required to keep safely all that come to his possession. But at any time the corporation may itself remove any of the books and papers not actually in use by the secretary, and put them in the custody of any other proper officer or employee of the company, and this was done in respect to these books four years ago. The witness, upon the testimony, can not claim, by virtue of his office and without the consent of the president or other officers of the company, to take these books and papers from the office in Chicago and bring them to New York. They can not, therefore, be said to be in his custody, because they are not so under his power and control that of his own will, and without obtaining the consent of others, he can take them and bring them into court. If they were in his office in New York, the corporation could, of course, make no rule or regulation as to their being kept there that would or should prevent his bringing them into court on this subpoena, because in that case whatever the regulation might be, they would be in his custody, he being in charge of the office where they are; but the books being in another place which is not in his charge, they can not be said to be constructively in his custody, unless they are in that place under his immediate control, or unless he has plenary power to take them and bring them away. It is said he should be required to use all the measures shown to be in his power to get them, and that he could get leave to bring them here by asking for it; but it does not appear that he could get such leave, except for some purpose connected with the company's business, and, if he could do so, this section does not impose any such duty upon the witness. Clearly the subpoena does not require him to obtain the custody of

The United States v. Samuel J. Tilden.

books in order to produce them, but simply to produce books and papers that *are* in his custody.

I have not found it necessary to consider whether, under the laws of Illinois, the books are required to be kept at the office in Chicago, nor whether, the subpoena from a United States Court running only a hundred miles, the witness can be required to go to a place more than a hundred miles to get books and papers to bring them into court, or must run the risk of having them sent to him without going personally to get them.

This is not a case of a person expecting to be a witness disabling himself from producing papers by sending them away. It is not, therefore, necessary to consider whether the laws provide any remedy in such a case.

Motion for attachment denied.

For the plaintiffs, *S. L. Woodford*, District Attorney, and
R. M. Sherman, Assistant District Attorney.

For the witness, *J. S. Lawrence*.

NOVEMBER, 1878.

THE UNITED STATES vs. SAMUEL J. TILDEN.

PRACTICE.—CONSTRUCTION OF STATUTE.—DEPOSITIONS *de bene esse*.—POWER
OF THE COURT TO ORDER THEM TO BE OPENED BEFORE TRIAL.

Depositions *de bene esse* taken pursuant to U. S. Rev. Stat. § 863 may be opened before the trial by order of the court upon motion of one party to the suit and against the objection of the other party.

The United States v. Samuel J. Tilden.

In the construction of the Revised Statutes of the United States the presumption is against an intention to change the meaning of a statute re-enacted therein. And no change of meaning will be imputed to a change of phraseology, unless the language used indicates an intended departure from the re-enacted statute.

U. S. Rev. Stat. § 865 is to be construed as a re-enactment of part of the 30th section of the Act of Sept. 24th, 1789, and is not to be construed as changing the construction of that section in respect to the time when depositions *de bene esse* may be opened.

CHOATE, J. This is a motion on the part of the plaintiffs to have certain depositions which have been taken in the cause under § 863 of the Revised Statutes opened and filed. The learned counsel for the defendant object on the ground that under § 865 such depositions can only be opened at the trial, unless by consent. Section 865 is as follows: "Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it was taken; or it shall together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal *until opened in court*. But unless it appears to the satisfaction of the court that the witness is *then* dead or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear in court, such deposition shall not be used in the cause." The argument for the defendant is that the word "*then*" refers for its antecedent to the words "in court" and that the context clearly shows that "then" means at the time of the trial, and therefore that the words "in court" necessarily import "in court upon the trial."

The United States v. Samuel J. Tilden.

It is also argued, from the fact that, where the deposition is returned personally by the magistrate to the court, no certificate as to the reasons for taking it is required, that this is because the magistrate is in such case within the contemplation of the statute present in court and may testify as to those reasons; that this indicates that such personal delivery is to be upon the trial only, and not before the trial. Hence an argument is drawn from this provision in aid of the construction contended for as to the other clause now particularly in question; that the entire provisions of the section indicate a policy that depositions *de bene esse*, which are the depositions to which the section relates, are not intended to be published or opened, unless by consent, until the trial. And it is further urged, in support of this theory of the statute, that reasons of public policy and regard to the rights and interests of the parties may well have required such protection against publicity; that under the original statute of 1789, which is in substance here re-enacted, such depositions could in some cases be taken without notice and in the absence of the opposite party; that in regard to all such depositions there was no discretion on the part of the magistrate to reject any testimony offered, and that therefore the taking of such depositions before the trial might be made the occasion for introducing irrelevant and scandalous matter, the publication of which, before the trial, may be greatly injurious to the reputation or good name of the party against whom it is taken, or may even tend to create such a prejudice against him as to prevent a fair trial; whereas, if the depositions were kept secret till offered upon the trial, such irrelevant and scandalous matter might then be suppressed and excluded. The argument drawn from the word "then" appears to have no force when this section is examined in connection with Stat. 1789,

The United States v. Samuel J. Tilden.

ch. 20, § 30, of which it is a re-enactment. In that earlier statute the two clauses which are brought together in Rev. Stat. § 865, are separated from each other by other provisions and the word "then" obviously does not relate back to the words "in court" as its antecedent. That the word "then" refers to the time of the trial is indisputable. In the original Act the language is: "And if an appeal be had such testimony may be used on the trial of the same if it shall appear to the satisfaction of the court which shall try the appeal that the witnesses are then dead or gone out of the United States or to a greater distance than as aforesaid from the place where the court is sitting or that by reason of age, etc., they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause." In the construction of the Revised Statutes of the United States the presumption is against an intention to change the meaning and construction of a statute re-enacted therein. The Revised Statutes purport to be, in general, a re-enactment of existing statutes (§ 5595). And, therefore, no change of meaning will be imputed to the change of phraseology, unless the language used in the revision indicates an intended departure from the meaning of the re-enacted statute; and section 5600 expressly repels any inference to be drawn from a different collocation of the parts of the old statutes in the revision. It is clear, I think, that on the point now in question, Rev. Stat. § 865 is to have the same construction as the 30th section of the Act of 1789, and that the word "*then*" in § 865 has no new or different meaning, and is not to be construed as relating back to the words "in court," as antecedent, but as referring to the time of the trial, which time is

The United States v. Samuel J. Tilden.

otherwise plainly referred to in the same clause in which the word "then" occurs.

While there is some uncertainty as to how the reasons for taking the deposition are to be made to appear, in case the magistrate taking the same delivers it personally into the court, I can not find either in the terms of this statute or the decisions or practice of the courts in relation to depositions taken *de bene esse* any such policy of keeping the same secret until the trial as is claimed on the part of the defendant. On the contrary, the rules of courts as well as the decisions assume that in respect to *all depositions* taken before the trial, the policy of the law is to have them opened and made accessible to the parties to the suit, in order that all formal questions in respect to the manner of taking may be disposed of before the trial. Thus, rule 113 of this court, adopted in 1838, provides that "depositions taken under commission, *or otherwise*, shall be forwarded to the clerk immediately after they are taken, and be filed on their return to the clerk's office, in term or vacation, etc. And all objections to the form and manner in which they were taken or returned shall be deemed waived, unless such objection shall be specified in writing in four days after the same are opened, unless further time shall be granted by the judge." Rule 114 provides "that in suits between individuals, either party may at any time after the commissions or depositions are deposited with the clerk, enter an order of course as of a special sessions, if in vacation, to open the same and deliver copies thereof;" and rule 115 provides "that in suits in which the United States are a party, such order may be entered on the written consent of the proctors or attorneys of the respective parties, or on motion to the court at a stated or special session." While the rules of court can not dispense with the requirements of the statutes, they may and

The United States v. Samuel J. Tilden.

often do furnish very satisfactory evidence of the practical construction which the courts have put on the statutes to which they refer, and these rules are clearly inconsistent with the supposition that, when they were framed and while they have been continued in force, this statute was regarded as forbidding the opening of depositions *de bene esse*, unless with consent of the parties, before they should be offered to be used upon the trial. Similar rules have been adopted in the District and Circuit Courts in other districts. And the same general policy is shown by the practice and the rules in the courts of the State of New York, and in the practice in regard to depositions taken in courts of equity. (See, also, *Shankwilser v. Reading*, 4 McLean 241; *Van Horn v. Penleton*, 2 Blatch C. C. 94; *Jasper v. Porter*, 2 McLean 579; *York Co. v. Central Railroad*, 3 Wall. 113; *Brooks v. Jenkins*, 3 McLean 439.) Nor does it seem that the peculiar character of the depositions taken under § 863 of the Revised Statutes, being in some cases, as the law originally stood, without notice, and at all times without power on the part of the magistrate to limit the subject of inquiry or to exclude any testimony from the record, affords any such strong grounds for withholding them from publication in the clerk's office prior to the trial, as to have been made the basis for a distinction in this respect between such depositions and depositions taken under commission. While it is possible that in some cases the power to take testimony may be abused for the purpose of publishing scandalous and irrelevant matter, yet on the other hand the power of either party to forbid the opening of the depositions until the trial may lead to abuses much worse, and to surprise and failure of justice on the trial. Thus, if this right has existed under the Act of 1789, a party taking a deposition *de bene esse*, even without notice before the recent change of the

The United States v. Samuel J. Tilden.

statute requiring notice, might have kept this deposition secret till the trial, and then have used the testimony of a witness whom the other side had not seen, nor had an opportunity to cross-examine, and whose testimony he would have no opportunity, perhaps, to rebut. So, also, a party taking depositions, which have been sealed up and certified by a magistrate, might be prevented till the trial from ascertaining whether they were certified and returned in due form and would have no opportunity to have any mistake in that respect corrected or obviated by retaking the depositions. These and other inconveniences far outweigh the inconveniences and possible injury to be done by publication, and fully justify the practice which has been referred to and which is embodied in the rules. Upon the whole, I think the statute will be entirely satisfied by the depositions being opened in the presence of the parties or their attorneys, in open court.

Motion granted.

For the plaintiff, U. S. District Attorney *Woodford* and Assistant U. S. District Attorney *Sherman*.

For the defendant, *T. Harland, A. J. Vanderpoel and J. K. Porter*.

Eastern District of New York.

NOVEMBER, 1878.

THE STEAMBOAT MASSACHUSETTS.

DAMAGE.—EXCESSIVE SPEED IN NARROW CHANNEL.—COSTS.

The M., a large passenger steamboat, passed through the channel between Blackwell's Island and New York City with excessive speed, being behind time. A canal-boat loaded with coal was lying then at a well-known and frequented place for discharging such vessels. The swell thrown by the M. rolled upon the canal-boat and sank her at once, the captain and his wife jumping into the river to save their lives. Thirty days afterwards the owner of the cargo of coal gave notice to the owners of the M. of a claim for damages and thereafter filed a libel to recover against the steamer:

Held, That the canal-boat was properly laden and made fast, and that, though such boats as the M. pass the place daily, no other such accident was shown to have occurred and that the case was not therefore one of inevitable accident;

That the M. was not in fault in going through that channel, or in going too near the canal-boat, but was in fault in running with excessive speed and that the loss was due to such fault and the steamboat was liable therefor;

But the court, to mark its disapprobation of the delay in giving notice of the claim to the M., refused to give costs to the libellant.

BENEDICT, J. This action is brought by the owner of a cargo of coal laden on board the canal-boat Dr. J. N. Huntley, to recover the damages arising from the sinking of that canal-boat and her cargo on the morning of the 9th of June, 1877.

It appears that this coal was laden on board the canal-boat at Port Johnson, and safely transported therein to the

The Steamboat Massachusetts.

bulk-head at the foot of East 61st st., New York. The boat arrived at the bulk-head on the evening of June 8th, and was made fast outside of a schooner then lying alongside the bulk-head. At about 9 o'clock the next morning the steamboat *Massachusetts*, one of the large passenger boats, engaged in making daily trips through the Sound, passed between the place where the canal-boat lay and Blackwell's Island, and in so doing raised a swell that broke over the canal-boat and sank her, causing the damage sued for.

The libel charges among other faults that the accident arose from the negligence of those navigating the *Massachusetts* in passing the canal-boat at an improper and unlawful rate of speed. The answer denies the negligence charged and avers that the accident arose from negligence on the part of those in charge of the canal-boat in that she was not properly secured at the bulk-head, and in that she was too deeply laden, and in that proper exertion was not put forth to avoid damage from the swell. The proofs show that the place where the canal-boat was moored was a well-known and much frequented discharging place for vessels of this class, and that so far as is known the present is the only instance of damage caused to any vessel lying there by the swells of passing steamboats, although the boat here proceeded against and others of her class pass the locality daily. The evidence also shows that this canal-boat was properly laden and that the accident cannot be attributed either to an excess of cargo or to the manner in which it was laden or to the manner in which the canal-boat was made fast or to any want of care or skill on the part of those in charge of the boat. The case is therefore one either of inevitable accident or of negligence on the part of the steamboat. There is no room for doubt that there was negligence on the part of the steamboat in regard to her speed.

The Steamboat *Massachusetts*.

At the place of the accident the river is narrow but not so narrow as in some other parts of that channel, and, although it is not very clearly shown that there was any necessity to pass so near the bulk-head as the *Massachusetts* did on this occasion, I do not hold her liable by reason of passing nearer to the canal-boat than she was entitled to do. Nor do I find her guilty of fault in passing Blackwell's Island by the channel on the New York side. She had an undoubted right to go down that channel, there being no question as to her ability to pass without endangering the safety of boats made fast where this boat was. It is constantly done by boats of large dimension with safety to all. But negligence is proved against the *Massachusetts* in regard to her speed. While boats of the large size of the *Massachusetts* have the right to navigate as well as boats of a smaller class, circumstances often arise when it becomes the duty of such boats to slack their speed because of the great swell they produce when moving rapidly. This is a known duty and its performance has been frequently observed. It has been enjoined by the courts in well-considered cases. (*The C. H. Northam*, 13 Blatch. 31. *The Morrisania*, 13 Blatch. 512 and cases there cited.) It is a duty that attaches as well in the case of passing a vessel at anchor or made fast at the pier as when passing a vessel in motion. The degree of care required of course varies with the circumstances.

In this instance the proof is clear that the *Massachusetts* was going at more than her ordinary rate of speed. Her unusual speed was the subject of remark to bystanders on the shore before the accident happened, and it is proved by several witnesses. This evidence receives confirmation from the fact that the steamboat was behind time. This unusual speed caused an unusual swell, so that the waves broke over

The Steamboat Massachusetts.

the canal-boat and sank her at once, the captain and his wife jumping into the river for the safety of their lives.

Against such a swell as the evidence shows to have been thus caused the canal-boat was unable to protect herself by any reasonable care, and for the damage thus caused to the libellant's coal the steamboat must be responsible, because she had no right to proceed at extraordinary speed in a narrow channel like this, where vessels were moored as this canal-boat was. "Her undoubted right to the navigation of the river is subject to the restriction that it must be exercised in a reasonable and careful manner and do no injury to others that care and prudence may avoid." Hunt, J., *The Morrisania*, 13 Blatch. 513.

The libellant is therefore entitled to a decree, but I give no costs for this reason: It does not appear that any notice of this claim was given to the steamboat until some thirty days after the damage was known to have occurred. The ease with which fictitious cases of damage done at the piers can be got up and the difficulty in being able to meet any such claim unless promptly informed of its existence, coupled with the fact that it is seldom if ever possible for those on board the steamboat to know when damage is done at the piers, seem to require some rule that shall insure notice being at once given to the steamboat when it is intended to charge her with liability for damage done at the piers by her swell.

As tending to secure this result I have on former occasions declared my intention to refuse costs in a case of this character, when prompt notice of the claim has not been given. To that I adhere, and no injustice can arise from throwing the burden of showing such notice upon the libellant. In this case no prompt notice is proved.

Henry J. Sleeper, *et al.*, v. Emilio Puig *et al.*

Let a decree be entered in favor of the libellant without costs and let it be referred to a commissioner to take proof of the amount of the loss.

For libellant, *Treadwell Cleveland.*

For claimants, *Wm. P. Dixon.*

Southern District of New York.

DECEMBER, 1878.

HENRY J. SLEEPER ET AL. VS. EMILIO PUIG ET AL.

CHARTER. — DEMURRAGE. — DISPATCH. — EXPENSE OF DISCHARGE. — COMMISSION ON ADVANCES.

Where a vessel is to have "dispatch for discharging," the time to be allowed is measured by the capacity of the vessel to deliver the cargo.

Under a charter containing such a clause a vessel arrived at Havana with a cargo of paving stones, which, by the rules of the port, were to be discharged at the mole. Her master reported to the consignees on April 4, but, by reason of its being Passion Week and the crowded state of the mole, she was not brought up to the mole till April 14, when she was moored bows on, and the stones discharged on a staging. The master could have discharged the cargo over the side of his vessel in five days, but, in consequence of discharging over the bow and of custom house regulations as to discharging, the vessel was not discharged till April 24th. The master of the vessel claimed demurrage and that some errors in the vessel's account should be corrected, which was refused by the consignees, and the vessel remained in port pending this dispute till May 3d :

Held, That the vessel was not entitled to demurrage after the discharge was completed ;

Henry J. Sleeper, *et al.*, v. Emilio Puig *et al.*

That the vessel was entitled to demurrage for all the time after she was reported till she was discharged, less five days;

That the vessel was not chargeable with the expense of the staging or extra expenses caused by discharging over the bow, because the charter agreed that the cargo should be received within reach of the vessel's tackles;

That the consignees, having made an advance to the master which by the charter was to be free of commission, could not claim a commission on it by reason of their having made the advance before they were required to do so.*

CHOATE, J. This is a libel by ship owners to recover demurrage and a balance due under the charter party from the charterers. The charter was for a voyage from New York to Santa Cruz (Canary Islands) and thence to Havana, Cuba, to carry from Santa Cruz to Havana "a cargo of stone or other lawful merchandise." The freight was to be \$4,000, gold, for the round voyage and the vessel's port charges at Canary Islands, "one-half payable on discharge of cargo at Santa Cruz in cash or in approved sixty days bills of exchange on London at \$4.84 to the £ sterling charterers option, balance on delivery of cargo at Havana, free of all commissions." The clause relating to demurrage was as follows: (Words in italics being printed.) "*It is further agreed that the said party of the second part shall be allowed for the loading and discharging of said vessel, dispatch for loading at New York and discharging at Havana, thirty running days for discharging and loading at Santa Cruz. And in case the vessel is longer detained by said party of the second part, or their agents, demurrage is to be paid the vessel's agent at the rate of thirty-five silver dollars per day for every day so detained.*" This charter also provided that the "cargoes shall be delivered and received alongside within reach of the vessel's tackles."

*Affirmed, 17 Blatch. C. C. R. 86.

Henry J. Sleeper, *et al.*, v. Emilio Puig *et al.*

The vessel having proceeded to Santa Cruz and there taken on board a cargo of paving stones, arrived at Havana on the 2d of April. On the 4th of April the master entered his vessel at the custom house and reported to the consignees, the charterers' agents. The rules of the port required that cargoes, such as this, should be discharged at the mole. The vessel having arrived during Passion Week, the charterers claim that they are excused from getting her a berth or proceeding with the work of discharging the ship till April 9th, and in consequence of the crowded state of the mole she was not brought up to the mole till the 14th. At the mole she was moored bow on, and at such a distance that, in order to discharge the cargo, it was necessary to build a staging from the hatchway forward to the bow, along which the stones were carried on trucks and then they were slid down an incline to the mole, where the consignees received them. The discharge was not completed till the 24th of April. It is proved that the master could, with the force at his command, have delivered the cargo over the side of his vessel in five days, but in consequence of delays in receiving the cargo on the part of the consignees, and the regulations of the custom house which forbade the discharge of cargo after nine in the forenoon without a special permit, and after two in the afternoon without a special permit, and in consequence of the neglect of the consignees to obtain such permit till several days after the discharge of the cargo commenced, the discharge was protracted as above stated till the 24th of April. After the discharge of the cargo, a misunderstanding arose between the master and the consignees as to the settlement of the ship's account, the master claiming demurrage and insisting on the correction of several alleged errors in the account. After several interviews, which did not result in an agreement, the master received the balance admitted by the

Henry J. Sleeper, *et al.*, v. Emilio Puig *et al.*

consignees to be due to the ship, but without consenting to the correctness of the account, and sailed on the 3d of May. The delay in sailing from April 24th to May 3d was wholly by reason of this dispute.

The libellants claim demurrage for twenty-three days, from April 4th, to May 2d, allowing five days as a proper time for discharging the cargo.

As to the delay while the cargo was being discharged between April 14th, and April 24th, it is clear that they are entitled to five days' demurrage. The term "dispatch," means "without delay." It does not mean "with diligence," nor does it refer to, nor is it controlled by, any usages, customs or rules of the port. It is a term that does not need construction by reference to extrinsic circumstances. A charterer, who stipulates for dispatch in discharge, takes all risks of being able to effect such discharge; and though without his fault, as by reason of stress of weather, ice, the impossibility of obtaining the necessary hands to receive the cargo, or other cause, he is obliged to detain the ship, he must pay the stipulated demurrage. The time allowed by this phrase for receiving the cargo is measured by the capacity of the ship to deliver it. This is well settled by authority. (*Davis v. Wallace*, 3 Clifford 123; *Kearon v. Pearson*, 7. *H. and N.* 386.) The libellants are therefore entitled to five days demurrage on account of the delay after the discharge commenced. As to the delay from the 24th of April to the 2d of May, it appears not to be within the stipulation of the charter party as to demurrage. The ship was not during this period detained by the consignees but by the master himself. It was not a delay in discharging for which demurrage is agreed to be paid. If the master thinks it for the interest of his owners to stay in port for the purpose of settling a dispute with the consignees, he may properly do so, but I do

Henry J. Sleeper, *et al.*, v. Emilio Puig *et al.*

not see how he can charge the damage caused by the loss of time in the use of the ship to the consignees as demurrage. If the consignees refuse to pay a balance due to the ship, the owners can recover interest from the time it became due and should have been paid, but the voyage is ended, and there can be no demurrage for such delay. It did not appear that the master was unable to sail by reason of the refusal of the consignees to settle the ship's account. What might be the effect of such inability is not now in question.

Whether the charterers are liable for demurrage between the 4th of April, when the ship arrived at her anchorage, and the 14th of April, when she was moored at the mole, is a more difficult question. It has been said that "lay days by the general rule do not commence until the vessel has arrived at the usual place for unloading." (1 *Parsons Shipping and Admiralty*, 313.) But this does not necessarily mean the very place where the cargo is to be discharged, although it is doubtless the duty of the master, where no place of discharge is designated, to proceed to the place to be designated by the consignee or charterer, provided it be a usual and proper place for discharge within the port of destination. (*Brown v. Johnson*, 10 M. and W. 331.) Thus in the case last cited where by the charter the voyage was to London with a cargo usually discharged in the docks, it was held that the lay days commenced with the arrival of the ship in the docks and not from the time of her arrival at the particular place in the docks where she was to discharge. This question of delay between arrival in the port and arrival at the place of discharge was touched upon in *Davis v. Wallace*, *supra*, but not decided, the court having found that the delay was acquiesced in by the master, which precluded the claim for demurrage; but, from the claim being dismissed on this ground, it may perhaps be inferred from the opinion that such delay

if unexcused is a proper subject for demurrage. In the present case the vessel appears to have been brought into the usual place of anchorage near the mole, where vessels await their turn for discharging at the mole. The consignees evidently assumed the entire control of the matter of finding a place for the discharge of the cargo. They thereby affirmed their duty under the contract, as they understood it, to take charge of the ship. It is evident that a delay in finding a place to discharge is as much within the mischiefs sought to be obviated by the requirement of "dispatch for discharging" in the charter party as a delay in receiving the cargo after the ship reached the wharf. I think upon the whole the case is within the rule laid down in *Brown v. Johnson, supra*, and that the charterers are liable for all delay from the time of the reporting of the vessel at her anchorage near the mole in readiness to deliver her cargo, and that the libellants are entitled to demurrage for fourteen days in all, allowing for one Sunday, which would have fallen within the period of the discharge if immediately commenced, and amounting to \$490—silver money.

The consignees charged the ship a commission on advances of \$42.25. This was in direct violation of the charter party and is not excused by the fact that the advance was made sooner than the charter party required. They might have refused to make the payment till required by the charter, but having made it they were bound by the stipulation that it should be free of all commissions.

The charges for building the staging to the bow, \$37.10, for extra men in trucking cargo from the hatch to the bow, \$68.00, and for two trucks for same service, \$8.50, making in all \$113.60, were improper, because it was agreed in the charter that the cargo should be delivered within reach of

Henry J. Sleeper, *et al.*, v. Emilio Puig *et al.*

the ship's tackles and no part of this expense would have been necessary if it had been so delivered.

The expense of towage and pilotage to and from the mole appears to have been a proper charge against the ship. The expense was necessary to the delivery of the cargo.

The fee of ten dollars paid as a gratification to a custom house officer is not shown to have been either necessary or proper and was improperly charged.

On the evidence there was an overcharge of five cents a ton for tonnage dues, amounting to \$13.15, gold, and also an error in computing the value of eagles, amounting to \$13.38, gold.

The above items for staging, fee to officer, extra men and trucks are computed in Spanish currency, which was to gold or silver as 240 to 100, and these items are therefore equivalent to

\$51 50, gold.

The other items are:

Demurrage,	\$490 00
Tonnage dues,	13 15
Commissions,	42 25
Error in eagles,	13 38

Total,	\$610 28
--------	----------

For which sum, with interest from May 2, 1874, and costs, the libellants are entitled to a decree.

For libellants, *Beebe, Wilcox & Hobbs.*

For respondents, *Coudert Bros.*

DECEMBER, 1878.

THE STEAMBOAT MONITOR.

SUPPLIES.—LIEN.—LEAVING PORT.

The departure of a steamboat, running between New York and Stuyvesant-on-the-Hudson, from New York on her daily trip is a "leaving of the port," within the language of the statute of New York of 1862, chapter 482, in relation to liens on domestic vessels; and specifications of lien must be filed within twelve days from such departure, to make the lien valid.

CHOATE, J. This is a libel for supplies furnished to the Monitor, in July and August, 1876. She made daily trips between New York and Stuyvesant, on the Hudson river, during the summer and until the 15th of November. Specifications of the claim were filed November 17th, 1876, in the office of the county clerk of the county of New York. The supplies were charged the vessel and owners, and in fact the libellant relied on the credit of the vessel. A lien is claimed, *first*, by the general maritime law, and *secondly*, by the New York Statute of 1862, ch. 482, § 2. The case of *The Lottawanna*, 21 Wall. 558, is conclusive against the general maritime lien. The State statute provides that the lien shall cease "whenever such ship or vessel shall leave the port at which such debt was contracted, unless the person having such lien shall, within twelve days after such departure, cause to be drawn up and filed specifications, etc." It is argued that the proper construction of the statute as applied to a steamboat running between one place and another within the district, is that the "*departure*" intended is the final departure from the port, and not her departure on her

The United States v. Anton Moller.

daily trip. I think the language will not admit of this construction. The words "shall leave the port" are unambiguous. They do not mean "shall leave the jurisdiction" or "the district." The vessel undoubtedly left the port of New York every day after these supplies were furnished. The specifications were not filed within twelve days thereafter. Therefore, the lien ceased. This construction was put upon the similar provision of the Revised Statutes of New York, in *Veltman v. Thompson*, 3 N. Y. 438.

Libel dismissed with costs.

For the libellant, *Henry Tompkins*.

For the claimant, *Ten Broeck and Van Orden*.

DECEMBER, 1878.

THE UNITED STATES vs. ANTON MOLLER.

ARREST ON EXECUTION.—SUIT FOR VALUE OF GOODS ILLEGALLY IMPORTED.
—MEANING OF "DAMAGES FOR FRAUD AND PENALTY" IN N. Y. CODE,
§ 549.

Judgment having been recovered against the defendant under U. S. Rev. Stat. §§ 2864 and 2839, for the value of goods illegally imported, and an execution against his property having been returned unsatisfied, and an execution against the person having been issued, on motion to set aside the latter execution :

Held, That the question whether defendant was liable to arrest on execution is by U. S. Rev. Stat. § 990 made dependent on the law of New York ;

The United States v. Anton Moller.

That, under the law of New York (Code §§ 1489, 548 and 549), defendant was not liable to arrest ;

That the action was not one to recover damages for a fraud, nor for a penalty within the meaning of N. Y. Code, § 549.

CHOATE, J. This is a motion to set aside an execution against the person. The suit was for the value of merchandize entered in violation of Rev. Stat. §§ 2864 and 2839, by which, in case goods are entered by means of a false invoice, the goods or their value are declared forfeited to the United States. The declaration was in the form of a declaration in debt, according to the old practice. The defendant was defaulted and judgment was entered upon his default. An execution against his property having been returned unsatisfied, this execution against the person was issued. The question whether the defendant is liable to arrest on execution, depends upon the law of the State of New York. If upon a judgment for the same cause of action in a State court, he would be liable to arrest on execution, he is so liable on this judgment, otherwise not. (Rev. Stat. § 990.)

The present law of New York, regulating the matter, is contained in sections 1487, 548 and 549 of the Code of Civil Procedure. By section 1487 an execution against the person is limited to two cases : *first*, "where the plaintiff's right to arrest the defendant depends upon the nature of the action," and *secondly*, "in any other case where an order of arrest has been granted and executed in the action and has not been vacated." There was no order of arrest in this action ; therefore, the sole question is whether this is a case where the nature of the action gives the plaintiff the right to an arrest. The reference here is to sections 548 and 549. Section 548 prohibits arrest in a civil action, except as prescribed by statute. Section 549 provides that the defendant may be arrested "where the action is brought for either of

The United States v. Anton Moller.

the following causes: (1.) To recover a fine or penalty; (2.) To recover damages for a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; * * fraud; deceit;" and certain other cases admitted to have no similarity to this suit. It is insisted by the plaintiff that this is "an action to recover damages for fraud," within the meaning of this section; but it seems to me that this claim can not be sustained. Section 549, in view of the prohibition contained in section 548, and of the nature of the right affected by this legislation, the right of personal liberty, if not to be strictly construed, should not be strained beyond the fair and proper meaning of the terms used to bring a case within its provisions. An action to recover damages for fraud is an expression apparently referring to that class of actions, well defined at the common law, in which the ground of the action was an actionable fraud practiced by the defendant on the plaintiff and the purpose of the action to recover the damages resulting to the plaintiff therefrom. Doubtless, it does not exclude cases where those damages may be made exemplary by the verdict of the jury. Is the present an action similar in the grounds on which it is based, or in the purposes it is designed to effect? Clearly not. It is an action of substantially a different and peculiar character, *sui generis*. Violations of the revenue laws have been in this country and in England always visited with this class of forfeitures, primarily of the goods, by means of which the offence was committed, and collaterally to prevent a loss to the government by reason of the sale or consumption of the goods, before discovery of the offence, by forfeiture of their value as an independent remedy. The theory of these statutes is that, by reason of the breach of the law, the goods become the goods of the government, if it sees fit to insist upon its right, and

The United States v. Anton Moller.

the action for their value is given as an equivalent or substitute for the right of seizure and forfeiture of the goods themselves. It is very true that under present and recent legislation there is no forfeiture either of the goods or their value, unless there is an actual intent to defraud the government; but although the proof of this is a prerequisite to a recovery, this does not make the action in substance an action to recover damages for the fraud, or alter its nature, essentially. The recovery has no relation whatever to any damages which the government may have suffered by reason of the fraud practiced. The amount to be recovered is neither more nor less than the value of the goods. It generally far exceeds the amount of duty of which the government has been deprived, but with changes of values and of markets, it is quite supposable that the value may be less. Nor by any latitude of construction can the forfeiture be regarded as of the nature of exemplary damages for the fraud. The Legislature of New York has not seen fit to allow an arrest in an action to recover forfeited goods or their value, and Congress has seen fit to limit the arrest of defendants on execution to cases in which it is allowed by the Legislature of New York, and has made no special provision for an arrest in this class of actions.

It is also claimed by the plaintiff that this is an action for a "penalty" within the meaning of the first subdivision of section 549. But the word "penalty," in connection with the word "fine," seems to refer to pecuniary penalties, under penal statutes. It has been repeatedly held that these revenue laws are not penal laws. And in no proper or common sense is this forfeiture a penalty.

Defendant discharged.

For motion, *B. B. Foster and J. J. Adams.*

Opposed, Assistant U. S. District Attorney *Tenney.*

In the matter of the Petition of the Norwich and N. Y. Transportation Co.

Eastern District of New York.

DECEMBER, 1878. .

IN THE MATTER OF THE PETITION OF THE NORWICH AND NEW YORK TRANSPORTATION CO.*

LIMITATION OF LIABILITY OF SHIPOWNERS.—INJUNCTION.—COSTS.

The injunction granted in a proceeding to limit the liability of a ship owner restraining the prosecution of suits pending against the ship owner, should not prohibit the collection of the taxable costs in such suits.

In such a proceeding the costs and expenses of the proceeding are first to be paid out of the fund.

The petitioner in such a case is entitled to a docket fee for each creditor who comes in and proves his claim. But he has no preference for his costs over the costs of the creditor.

BENEDICT, J. This case comes before the court upon a motion to settle the form of the decree and to retax the costs of this proceeding.

The first question to be disposed of is whether the injunction to be granted in this proceeding for the purpose of restraining the further prosecution of the suits mentioned in the decree, should prohibit the collection of the taxable costs in such suits. Upon this question my opinion is that the injunction should not prohibit the proctors from collecting the costs referred to.

The liability which the statute was intended to limit is that caused by the collision and not that arising out of pro-

*See 8 Ben. p. 312.

In the matter of the Petition of the Norwich and N. Y. Transportation Co.

ceedings taken in defence of suits brought against the owners or the vessel, and there is no language in the statute which authorizes an application of the value of the vessel to the discharge of any costs other than those of the proceeding taken to obtain the benefit of the Act. The decree made by the Supreme Court of the United States in one of the actions sought to be enjoined, while not deciding the question, points to a liability for the costs of that action without regard to the result of the proceeding which for that reason has been entertained here. (*Norwich Co. v. Wright*, 13 Wal. 128.)

Under the English statute the rule seems to have been settled, and there the ship owner is held liable to pay the costs without regard to the value of the ship. Says Maclachlan: "the costs of suit form no part of the loss or damage to be compensated and the owner is therefore liable for them personally and without regard to the value of the ship and freight. A vexatious resistance to a just claim would be encouraged by any other rule." (*Maclachlan on Shipping*, p. 113.) The reason suggested by this author has full force in the case of proceedings under our statute, and is sufficient to warrant the adoption of such a rule here.

A similar rule seems to be applied in cases of abandonment under the general maritime law. See Caumont, *Dictionnaire de droit maritime*, p. 37, title *Abandon Maritime*, § 92. See also Bedarride, *Commentaire du Code*, vol. 1, § 297, where it is said that as, in the absence of an abandonment by the owner, the creditor who sues only exercises a plain legal right, such action on his part does not render him liable for the expense thereof.

The other questions presented for consideration relate to the costs of this proceeding.

In the matter of the Petition of the Norwich and N. Y. Transportation Co.

By the 55th rule the costs and expenses of this proceeding are first to be paid out of the proceeds of the vessel and freight. Under this rule I understand that the taxable costs and expenses incurred by the ship owner in the proceeding taken to secure a distribution of the value of the vessel among the creditors and to relieve him from further liability are required to be paid out of the fund.

In this instance some seventeen different parties, claiming damages arising out of the collision in question, have, in answer to the citation issued in pursuance of rule 54, appeared before the court and made proof of their respective claims. Each of their demands is a distinct claim arising upon a separate bill of lading; and upon the proving of each one the proctor for the petitioner attended and was heard in regard thereto. In each such case there is a final hearing and a decree awarding payment out of the fund. The proctor of the petitioner is therefore entitled to a docket fee in each such case, both upon the hearing and upon the reference. I can see no ground for refusing him costs if any one is entitled to costs; and the right to costs of the parties who have come in and proved their claims has not been disputed here. Such costs I am informed have been allowed by Judge Choate in a similar case under the same statute.

But the petitioners' costs are not entitled to a preference over the costs of the creditors. All costs and expenses stand upon an equal footing, and in case of a deficiency in the fund, are to be paid *pro rata*.

Let the decree be settled and the costs, taxed in accordance with this opinion, be inserted therein.

For petitioner, *J. W. C. Leveridge*.

For creditors, *J. Langdon Ward* and *R. H. Huntley*.

DECEMBER, 1878.

THE SLOOP MARTHA C. BURNITE.

PRACTICE.—STIPULATION FOR VALUE.—BOND UNDER SECTION 941 OF THE
U. S. REVISED STATUTES.

A stipulation for value can be substituted for property in custody, at any time, by order of court.

At any time before default, property in custody may be bonded in pursuance of section 941 of the Revised Statutes of the United States, without any other condition than is prescribed in that section:

But whether it can be so bonded as a matter of right, after a default, *quere*.

BENEDICT, J. I greatly doubt whether a party can as a matter of right obtain the release of a vessel from custody by giving a bond under section 941 of the U. S. Revised Statutes after a default has been entered upon the return of the process. It seems to be the intention that the bond should be approved and either filed or returned by the marshal for the purpose of being filed with the process, and it is plainly intended that the bond should be given before any decree has been rendered in the cause. Of course, as in other cases, a stipulation for value may be substituted for property in custody at any time, by leave of the court, but that is a different thing from giving the bond provided for in section 941. The difficulty here is that there has been no default and no publication of notice upon which a default can now be taken. The right, therefore, to have a bond approved in pursuance of section 941 still exists, and may be exercised without any condition other than is prescribed in the section.

In the matter of John Leary, Petitioner for *habeas corpus*.

The application, therefore, to have terms imposed as a condition of being allowed to bond under section 941 must be denied.

The bond, being regular in form, and the sureties having justified on due notice to the libellant, must be approved.

For libellant, *T. C. Campbell*.

For claimant, *Beebe, Wilcox & Hobbs*.

Southern District of New York.

JANUARY, 1879.

IN THE MATTER OF JOHN LEARY, PETITIONER.

EXTRADITION.—HABEAS CORPUS.—PRACTICE.—CONCLUSIVENESS OF WARRANT.—EVIDENCE.

On *habeas corpus*, where the prisoner is held under an extradition warrant of the Governor, which recites that it was issued upon the requisition of the Governor of another State, accompanied by a copy of an indictment for burglary, certified as duly authenticated, the warrant is conclusive evidence that the person named therein stands charged with crime in such other State within the meaning of the Constitution and of U. S. Rev. Stat. § 578 (St. 1793, c. 7, § 1).

Although by his traverse to the return the prisoner denies that any such charge of crime was made or that there is any such indictment against him, and craves *oyer* of the same and demands that the respondent be put to the proof thereof, it is not necessary for the respondent to produce a copy of such indictment or of the requisition of the Governor of the de-

In the matter of John Leary, Petitioner for *habeas corpus*.

manding State, nor is the prisoner entitled to a writ of *certiorari* or other process against the Governor to compel the production of the papers on which the warrant issued, nor is it necessary that copies of said papers should be annexed to the warrant, nor that a copy of the indictment authenticated in the mode provided by Act of Congress for the authentication of records of one State to be used in another State (Rev. Stat. § 905), should be produced to the Governor before the issue of the warrant.

Where the petition for *habeas corpus* and the traverse to the return denied that the prisoner was a fugitive from justice, or the person named in the warrant, and the respondent produced a witness who testified that he attended the session of the grand jury in the county in which by the warrant it appeared that the crime of burglary was charged to have been committed, and that the subject of inquiry was the said burglary, and that he was sworn as a witness, and that his testimony related to J. L. and others, and the meetings of said persons, and that the J. L. referred to in his testimony was the prisoner, and that he procured the warrant from the Governor :

Held, That this was sufficient evidence, at least *prima facie*, that the prisoner, whose name was J. L., was the same person named in the warrant and a fugitive from justice, although the witness testified on cross-examination that he never saw the prisoner in such other State.

Whether in all cases the warrant is conclusive evidence on *habeas corpus* that the person named therein is a fugitive from justice, *quere*.

The word "crime," in the article of the Constitution relating to inter-State extradition and the statute (Rev. Stat. § 5278), includes every act made criminal by the law of the demanding State, whether it was so at common law or not, and even though made so by a law subsequent to the adoption of the Constitution and the passage of said Act of Congress.

Under U. S. Rev. Stat. § 760, no pleading is required after the traverse to the return. The new matter averred therein is to be deemed at issue.

On *habeas corpus* the question of the identity of the prisoner with the person named in the warrant is always open.

A court of the United States has jurisdiction of a petition for *habeas corpus* by a person alleged to be illegally restrained of his liberty under or by color of the authority of the United States, although a proceeding by *certiorari* is pending in a State court at his suit for the review of a decision of an inferior court dismissing the writ of *habeas corpus* issued on his petition.

On *habeas corpus* before a court of the United States sued out by a prisoner held under a warrant of the Governor as a fugitive from justice, it is not necessary that notice of the proceeding be given to the attorney-general of this State.

In the matter of John Leary, Petitioner for *habeas corpus*.

CHOATE, J. The petitioner, John Leary, by his petition sworn to the 21st day of December, 1878, applied to this court for a writ of *habeas corpus*, averring that he was held in custody by the sheriff of the city and county of New York ; that the pretence of his imprisonment was a warrant issued by the Governor of New York directing the sheriff to arrest said Leary and deliver him over to the custody of one Pinkerton, to be taken to the State of Massachusetts, upon a requisition of the Governor of Massachusetts to the Governor of New York, charging him with the commission of a felony in the State of Massachusetts and with being a fugitive from justice from said State ; that the petitioner denied that he was the person named and mentioned in said requisition or in said warrant of extradition or that he ever fled from the said State of Massachusetts to the State of New York.

The writ was allowed, and the sheriff produced the prisoner and made return that he arrested and held him under a writ or requisition directed and duly issued to him as such sheriff by the Governor of New York, of which writ he annexed to his return a copy and the original of which he produced, and *secondly*, that, while he so held the petitioner in custody, a writ of *habeas corpus* was served upon him issuing out of the Supreme Court of the State of New York, requiring him to produce the petitioner before one of the justices of that court ; that in compliance with that writ he had produced the petitioner before said justice, that a hearing was had on said writ of *habeas corpus* and finally determined by an order dismissing the writ and remanding the prisoner ; that afterwards the prisoner sued out a writ of *certiorari* to review said determination, upon which writ a justice of said Supreme Court had made an endorsement allowing the same and directing that said writ operate as a stay of proceedings until the decision of the general term of

In the matter of John Leary, Petitioner for *habeas corpus*.

said court thereon, and directing that the sheriff in the meanwhile keep the prisoner in his custody. The relator filed his answer or traverse, wherein he denied that he was the person mentioned or described in the alleged requisition, if any was made by the Governor of Massachusetts, or that he was the person mentioned in the warrant of arrest, or that a copy, certified as authentic by the Governor of Massachusetts, of any indictment found or affidavit made before any magistrate of said State of Massachusetts, charging him with having committed any crime in Massachusetts, was produced by the executive authority of Massachusetts to the Governor of New York in connection with any such alleged demand, or that any charge of any crime under the provisions of the Constitution of the United States, or of the Acts of Congress in such behalf, had ever been made in the State of Massachusetts against him, on which the arrest and detention were founded, or that any such pretended charge in the form of an indictment or affidavit had been produced before, furnished or exhibited to him the relator as the basis of said proceedings for extradition. And he craved oyer of said pretended charge, if any, and that the respondent should be put to his proper and necessary proof. He also denied that, at the date of the alleged demand by the Governor of Massachusetts, the Governor of that State had before him any facts showing that the petitioner then was, or ever had been, a fugitive from the justice of that State, and he denied that he was such fugitive, or that any facts or evidence were shown or produced to the Governor of New York, sufficient to show that he was such fugitive from justice. He also denied the commission of any offence in the State of Massachusetts, or that he was ever in the county of Hampshire where said crime was alleged to have been committed. He further alleged that he was a citizen of the State of New York and

In the matter of John Leary, Petitioner for *habeas corpus*.

had been a resident thereof for the last five years ; that he was not in the State of Massachusetts at the date when said alleged crime was committed nor for five years prior thereto nor at any time since ; that the said requisition was procured and his arrest and extradition promoted for some hidden and ulterior motives, and that the whole proceeding was a misuse and abuse of the provisions of the Constitution and laws of the United States in which the Governors of Massachusetts and New York had been unwittingly misled.

The writ or mandate issued by the Governor of New York, recited that "whereas, it has been represented to me by the Governor of the State of Massachusetts that John Leary, James Brady, James Draper and James Grier, stand charged with the crime of burglary and entering the Northampton National Bank and stealing the moneys thereof, committed in the county of Hampshire in said State, and that they have fled from justice in that State, and have taken refuge in the State of New York ; and the said Governor of Massachusetts having in pursuance of the Constitution and laws of the United States, demanded of me that I shall cause the said John Leary, James Brady, James Draper and James Grier to be arrested and delivered to Robert A. Pinkerton, who is duly authorized to receive them into his custody and convey them back to the said State of Massachusetts ; and whereas, the said representation and demand is accompanied by a copy of this indictment, whereby the said John Leary, James Brady, James Draper and James Grier are charged with the said crime, and with having fled from said State and taken refuge in the State of New York, which is certified by the said Governor of Massachusetts to be duly authenticated, you are therefore required to arrest and secure, etc., etc."

Upon the return day of the writ, besides the sheriff, who

In the matter of John Leary, Petitioner for *habeas corpus*.

appeared in person and by counsel, the State of Massachusetts appeared by counsel.

The petitioner having filed his traverse or answer to the return, it was held that the statute required no further pleading, but that the averments of the answer would be taken as denied by the respondent.

The return having been filed, the counsel for the State of Massachusetts moved that the writ be dismissed or that the prisoner be remanded pending the proceedings in the State court on the writ of certiorari, on the ground that the prisoner was to be regarded as constructively in the custody of the State court and that therefore this court would not, on principles of comity, proceed with a matter which might involve the taking of the prisoner out of the custody of the State court. But it was *held* that the proceeding pending in the State court, in the nature of a review on appeal from the decision of the justice, did not prevent this court from proceeding with the cause, and the motion was denied.

The counsel for Massachusetts then and before the traverse was filed, by leave of the court withdrew his appearance.

The counsel for the prisoner moved that notice be given of these proceedings to the attorney-general of the State of New York. But it was held that the statute required no such notice and the motion was denied.

The respondent then called as a witness one Robert A. Pinkerton, who testified that his occupation was that of a detective, that he had known the prisoner for four or five years in several cities; that he was present at proceedings before the grand jury of Hampshire county in Massachusetts in June, 1877, and was sworn as a witness; that the subject of inquiry was the robbery of the Northampton Bank, that his testimony related to John Leary, James Brady, James

In the matter of John Leary, Petitioner for *habeas corpus*.

Draper and James Grier, and in relation to meetings between those four persons; that the John Leary, to whom his testimony related, was the prisoner; that he caused this mandate of the Governor of New York to be procured and that it was sent to him by the Governor. On cross-examination he testified that he never saw the prisoner in Massachusetts.

The mandate of the Governor was then read in evidence.

Upon this evidence, the respondent having rested, the counsel for the prisoner moved for his discharge, on the ground that there was not sufficient evidence that he was the person against whom the mandate issued, nor that he was a fugitive from justice, nor any competent evidence that he was *charged with crime*. This motion was denied and it was held that there was sufficient evidence for the respondent on these issues, at least *prima facie*.

The counsel for the prisoner offered to read in evidence as an affidavit the petition for the writ of *habeas corpus*. The prisoner was in court. The motion was denied on the ground that it would not be a proper exercise of the discretion, with which the court is vested to receive affidavits in evidence on proceedings of this character, to receive this affidavit, the affiant being present and able to testify in person.

The counsel for the prisoner claimed that the burden of proof as to a charge of crime was upon the respondent; that the petitioner having denied that he was charged with crime, the respondent should be held obliged to produce a copy of the indictment, if any there was, duly authenticated according to the provisions of the Act of Congress regulating the authentication of the judicial records of one State that are offered in evidence in another State, that is, a copy certified by the clerk of the court under its seal with the certificate of the judge to the genuineness of the clerk's attestation; that the

NEW YORK.

proof that a requirement of Massachusetts in documents required, and that these papers issued his mandate, be produced before judicially on the question of charge of crime and the counsel for the recitals of the maintenance and sufficiency a right to produce are not on his request could have the process

by the respondent
not only *prima facie*
proofs of the fact
within the meaning
of the law; that the papers
be, if produced, com-

In the matter of John Leary, Petitioner for *habeas corpus*.

petent evidence, and that there is no power in the court to compel their production.

This question depends upon the construction of the clause of the Constitution relating to fugitives from justice and of the Act of Congress which was passed to carry it into effect. The clause of the Constitution is as follows: "A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." And the Act of Congress passed in 1793 to carry this constitutional provision into effect and to provide a mode of procedure under it (1 Stat. at Large, p. 302) is as follows: "Section 1. That whenever the executive authority of any State in the Union, etc., shall demand any person as a fugitive from justice, of the executive authority of any such State, etc., to which such person shall have fled, and shall moreover produce the copy of an indictment found or an affidavit made before a magistrate of any State, etc., as aforesaid, charging the person so demanded with having committed treason, felony or other crime, certified as authentic by the Governor or chief magistrate of the State, etc., from whence the prisoner so charged fled, it shall be the duty of the executive authority of the State, etc., to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." Section 2 authorizes such agent to transport the person so delivered to him to the State from which he shall have fled.

In the matter of John Leary, Petitioner for *habeas corpus*.

For the proper understanding of these provisions, it is necessary to consider the nature of the subject matter thus regulated and the existing state of affairs at the time of the adoption of the Constitution and the passage of this statute. The duty of delivering up fugitives from justice as between independent states and nations, unless affected by treaty, that is, by express contract between them, rests wholly on principles of comity, that is, upon the natural inclination of States on terms of amity with each other, to concede to each other such reasonable favors on request as shall not be inconsistent with their own interests or the rights and interests of their own subjects or citizens, and to secure for themselves a reciprocity of benefits by the exchange of such friendly offices. And while some continental jurists have claimed that the surrender of fugitives from justice in cases of atrocious crime may be demanded as a right by one State of another, this right has in England and this country been denied to have any existence. (Story on Conflict of Laws, § 628, and authorities cited; Opinions of Jefferson, Monroe and Clay, cited in Hurd on Hab. Corp., 2d ed., pp. 578 and 579. And see *Holmes v. Jennison*, 14 Peters, 540.)

It has been said that "prior to the American Revolution, a criminal flying from one English colony into another, found no protection, but was arrested by the authorities of the territories into which he fled and delivered up for trial within the jurisdiction where the offence was committed, and this because the several colonies formed but parts of the same Empire, under a common sovereign, and therefore presented no opportunities for the conflict of the rights and duties of independent sovereigns." (Letter of Judge Bell to the Governor of Penn., 2 Pa. L. J., p. 150.)

It appears, however, that the practice of returning such fugitives as between the American colonies, rested partly at

In the matter of John Leary, Petitioner for *habeas corpus*.

least on treaties between the several colonies. (Treaty between the colonies of Mass., New Plymouth and Conn., referred to by Ch. Justice Taney in *Kentucky v. Dennison*, 24 How. 101.) But whatever may have been the practice in this respect between the colonies, and on whatever basis of law or treaty it rested, there is no doubt that when the colonies achieved their independence they stood towards each other, as regards this matter, in the position of independent States, and the surrender of fugitives from justice became, as with other sovereign States, purely a matter of comity, except so far as it was or should be regulated by treaty or compact between them. And yet from the manner in which the country had been settled, and from the artificial character of the State boundaries, the dividing lines between them having been fixed with little or no regard to natural barriers or lines of defence, running in some cases in the close vicinity of cities or large towns, being, in fact, such boundaries as could only have been produced or continued during a long period of peace between the colonies, the escape of fugitives from one of the States to another was peculiarly easy, and the mischiefs thus resulting threatened not only the domestic peace of the States, but also their friendly relations with each other, unless some reasonable regulation thereof was effected. And when the articles of confederation were adopted, a provision was made for the surrender of fugitives from justice almost identical with that afterwards incorporated into the Constitution of the United States. The language of the Constitution is, as regards the nature of the duty to deliver the fugitive, imperative and unequivocal. "A person charged with treason, felony, or other crime, who shall flee from justice and be found in another State, *shall*, on demand, etc., be delivered up." And the great weight of authority, as well as the obvious import of the language used,

In the matter of John Leary, Petitioner for *habeas corpus*.

is, that the Constitution established an *absolute right* to the surrender, when the case was one coming within the terms of the Constitution—that is, the case of a person *charged with crime*—who had *fled from justice*—and *whose surrender was demanded by the proper authority*. It is true that the duty has been by the Governors of some of the States treated as discretionary, but the authorities are clearly against this view. (*Kentucky v. Dennison*, 24 How. 66.) It has been well remarked in reference to the case last cited, that although the court finally came to the conclusion that they had no jurisdiction to grant the mandamus prayed for, yet the views expressed in that decision as to the construction of this clause of the Constitution possess but little less than the force of absolute authority. (*Matter of Voorhees*, 32 N. J. L. R., 149.) And it is now settled by a great preponderance of authority, State as well as Federal, that the word crime in this clause of the Constitution embraces every species of offence made punishable as a crime by the laws of the State making the demand, even though it were not a crime by the common law or the laws of other States, and even though for the first time made a crime by a law passed subsequently to the adoption of the Constitution and the passage of this Act of Congress.

Therefore, it appears that the right to demand the surrender of a fugitive from justice, as between these States, is no longer an imperfect right to be conceded as matter of favor or comity, or refused, if the State in which he has taken refuge may so determine, on consideration of its interest or policy, or its view of international law, nor a right resting in the obligation of a contract alone, as by treaty, but a constitutional and legal right, having fixed and well-ascertained conditions. And the same instrument or frame of Government, which for national purposes welded the several

In the matter of John Leary, Petitioner for *habeas corpus*.

States into a single country, brought this matter and this obligation within the purview and jurisdiction of the Federal authority. As the Constitution is more than a compact between the States, so this right and this obligation, as secured by the Constitution, became something more than an obligation and a right resting in contract or treaty.

But the Constitution did not provide means for carrying into effect this provision, and soon a case arose between Virginia and Pennsylvania, in which the return of a fugitive was denied, because Congress had passed no law pointing out the means for enforcing this provision,—determining how and on what officer the demand should be made, and by what evidence it should be supported. Then followed the Act of 1793, now in question. By that Act the demand is required to be made on the Governor of the State, and to be accompanied by a copy of the indictment found, or affidavit before the magistrate, charging the crime, certified by the Governor of the State making the demand as authentic.

Independently of all constitutional and legislative provisions, the surrender of fugitives from justice has, between nations, been treated as an executive power lodged in the supreme executive authority of the State. It was an *international* concern, and the executive is the organ of communication between one State and another, and under the first treaty with Great Britain, in the case of Robbins, the power of the President to surrender a fugitive from justice, whose extradition was claimed under a treaty which is declared by the Constitution to have the force of law, was held by the concurring authority of the executive department of the Government, the House of Representatives and the District Court of the United States for the District of South Carolina to be exclusively an executive power and duty in the absence of any legislative regulation. (See statement of this case in

In the matter of John Leary, Petitioner for *habeas corpus*.

Hurd on Hab. Corp., 2d ed., pp. 582-588. See, also, *Holmes v. Jennison, supra.*) Although this case provoked great discussion, yet the result shows how strongly, at that time, the opinion prevailed that this was essentially an executive power. While Congress had a considerable latitude of choice as to the means to be employed to enforce this constitutional obligation and right, it saw fit to preserve, as nearly as possible, the existing methods as to dealing with the subject, devolving the duty of performing the obligation on the supreme executive authority of the State where the fugitive might be found. As to the evidence to be produced to him that the party demanded is *charged with crime*, the mode of proof is particularly prescribed and limited by the Act itself. It must be by a copy of an indictment or affidavit certified by the Governor of the State making the demand as authentic. Under this statute clearly no other evidence is sufficient, or can be received by the Governor on whom the demand is made as sufficient in proof of the fact that such indictment or affidavit exists as the basis of the charge of crime. The Constitution provides that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and Congress may, by general laws, prescribe the manner in which acts, records and proceedings shall be proved, and the effect thereof." Congress has, by general laws, provided the mode of proving in one State the judicial records of another State, but it was clearly competent for Congress, by a general law, to provide what should be the mode of proving an indictment, or other judicial proceeding, for the purpose of these extradition proceedings, and Congress having legislated thereon, the authentication by the Governor of the copy is clearly the mode provided by general law for this purpose, and such authentication imports absolute verity, and no

In the matter of John Leary, Petitioner for *habeas corpus*.

other authentication is necessary to enable the Governor to act under the statute, although for other purposes Congress has provided a different mode of proving State records. This disposes of the claim that a copy of the indictment certified by the clerk of the court with the accompanying certificate of the judge, must be produced either to the Governor or to this court in proof of the fact that the party is charged with crime.

And upon the question whether the warrant of the Governor is conclusive evidence in this proceeding that the party named in the warrant stands charged with crime in the State demanding his surrender, I am of opinion that both on reason and authority the warrant is conclusive. The statute itself especially provides, that the Governor shall cause the party to be arrested and delivered up. It makes no provision for any other proceedings whatever subsequent to the issue of the mandate of the Governor except the delivery of the party and his removal by the agent of the demanding State. It may well be assumed that in devolving this duty and responsibility on the highest executive officer of the State, Congress understood that they were making a suitable provision for securing the careful execution of the duty under circumstances calling for great caution and circumspection. The Governors of these States were the representatives of the sovereignty of the States, so far as it still existed in a qualified form. They were aided in their positions by high legal officials, and in some of the States had the Constitutional right to call on the highest court in the State for its opinion on doubtful questions of law. They were especially charged with the execution of the laws of the State and might be assumed to be naturally jealous of any attempt to abuse this particular right of demanding fugitives, since it was a demand for the surrender of their own citizens or persons found

In the matter of John Leary, Petitioner for *habeas corpus*.

within the protection of their own laws. Not only is there nothing in the Act to show that any proceedings subsequent to the issue of the warrant were contemplated to give full authority for the arrest and removal of the party, but there is nothing in the Act requiring the Governor issuing the warrant to attach thereto the evidence or copies of the evidence on which he acted, nor since the passage of the Act has the practice obtained, so far as appears, of attaching such copies. This uniform practice of eighty-five years is strong proof that no such copies are necessary to accompany the warrant. Moreover, neither by this Act, nor by any other, is any process given for compelling the Governor of a State to perform a federal duty or obligation devolved upon him by a federal law. In this very matter the Supreme Court of the United States have held that while the duty of surrender is absolute and a mere ministerial duty, yet that, especially in view of the nature and dignity of the office of Governor and the great public mischiefs that would result from the exercise of such coercive powers against him, the Federal Government has not in any of its departments the power to issue the writ of mandamus against him to compel the issue of the warrant. (*Kentucky v. Dennison, ut supra.*) It is suggested in the present case that this court can issue a writ of *certiorari* against the Governor, to compel the production of this record, but the objections stated in the case last cited against a mandamus apply with equal or still greater force to the exercise of such a power by this court. Nor can the Governor of the State be regarded as in the position of an inferior tribunal or magistrate to whom the writ of *certiorari* will issue in aid of a writ of *habeas corpus*. In the performance of this duty, he does not act as an inferior magistrate, but as the representative of, and the officer vested with, the executive authority of the State, and not as a federal officer or magistrate.

In the matter of John Leary, Petitioner for *habeas corpus*.

Speaking of the Governor's duty to issue the warrant, Chief Justice Taney says: "The Act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the Constitution, which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer as such any duty whatever and compel him to perform it; for if it possessed this power it might over-load the officer with duties, which would fill up all his time and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State." "But if the Governor of Ohio refuses to discharge this duty [i. e., "the obligation on the State to carry into execution" this law] there is no power delegated to the general government, either through the judicial department or any other department to use any coercive means to compel him." And if it was not within the contemplation of Congress that any coercive measures should be used against the Governor to compel the performance of the principal duty involved, namely, the issuing of the warrant, it is not supposable that it was within their contemplation that any coercive measures would or could be used to compel the performance of any other duty that might devolve upon him as an incident to, or result of, the performance of such principal duty. And if the issue of a mandamus by the Supreme Court against a Governor might lead to imposing on him duties inconsistent with the performance of the duties of his office of Gov-

In the matter of John Leary, Petitioner for *habeas corpus*.

ernor of the State and with the dignity of his position; yet more unseemly and improper would be the attempt of an inferior court of the United States to subject him to the process of *certiorari* to compel the production of papers, with the consequences which must flow from his refusal, of his being treated by the court as in contempt. The total want of power to compel the production of the papers on which the Governor acted, is itself a strong argument against the intention of Congress to make the Governor's determination subject to review by the courts.

The relations in which the States stood to each other at the time of the formation of the Constitution, and the relations which that Constitution created between them, as known and understood at the time of the passage of the Act, make it not improbable nor unreasonable to suppose, that the warrant of the Governor should on this question of the fact and sufficiency of the charge be made conclusive within the intention of Congress, even though the effect of it is that the party should, when arrested on the warrant, be deprived of an opportunity to contest that fact on *habeas corpus* in the State in which he is arrested. The prior relations of the States were friendly. They had recently won their independence by a war in which they had acted together. Their territories were largely settled by people from the same country and in all of them the system of the common law of England obtained, by which all persons restrained of their liberty had free access to the courts on *habeas corpus*, to inquire into the cause of their detention. And the people of these States had entered by this constitution into "a more perfect union," among the declared objects of which were "to establish justice, insure domestic tranquillity and promote the general welfare." The thirteen States thereby became one nation, in all parts of whose territory the citizens of

In the matter of John Leary, Petitioner for *habeas corpus*.

each were to have the rights and immunities of citizens of that common country and were not to be in any of the States in the position of strangers and foreigners. Considering that all the disadvantage that results from the conclusiveness of the warrant of the Governor on this point is that the alleged fugitive is thereby removed to another State of the Union where he has open to him still the privileges of *habeas corpus*, and a trial according to the methods and under the securities of a system of law similar to that prevailing in his own State, and where all his privileges of citizenship remain, and considering the existing relations of the States, there was neither such hardship nor such apparent risk of injustice as to have created any reasonable apprehension that such an arrangement imperilled or put in jeopardy the life or liberty of the citizen, or was liable to subject him to any unreasonable detention or inconvenience beyond what was essential to a proper regard to the public safety and the orderly administration of public justice. The unhappy differences that have since arisen between the several parts of the Union, and which might have suggested danger to life or liberty in this arrangement, did not then exist and cannot have been had in view by the Congress which framed this law.

In the treatment of this subject it is not to be overlooked that this is in the nature of a national police regulation, and that the arrest, detention and removal of the alleged offender are not for the purpose of punishment, but for purposes preliminary to trial, and for the securing of persons against whom there is probable cause to believe that they are offenders against the laws, and that this provision of the Constitution and this Act of Congress are based upon the theory that as between these States the proper place for

In the matter of John Leary, Petitioner for *habeas corpus*.

the inquiry into the question of guilt or innocence is the State where the offence is alleged to have been committed.

In view, then, of the nature of the right and obligation sought to be enforced by this statute, of the prior history of the subject matter, of the terms of the law itself and the practice under it, of the character and dignity of the office of the Governor on whom the duty of determining the question prior to the issue of the warrant devolved, of the security against abuse afforded by his position, responsibility and surroundings, of the evident impossibility of issuing process to review his decision, and of the relation between the States before and at the time of the enactment of the law, and of the purpose and effect of the warrant of removal, I think that the recital of the warrant was intended by Congress to be conclusive as to the charge of crime made against the alleged fugitive and that the refusal of Governor Robinson to furnish to the petitioner the requisition and accompanying copy of indictment for the purpose of the proposed review of this decision by this court was in entire accordance with the proper view of his official duty, under the Act of Congress in question.

As a question of authority, the decisions of the courts are conflicting. In *The State v. Buzine*, 4 Harrington (Del.) 572, Ch. Justice Booth held the warrant conclusive, disposing of the matter in the following language: "These matters are entrusted to the judgment of the executive upon whom the demand is made; and if his mind is fully satisfied in regard to them, the Act of Congress makes it his imperative duty to cause the fugitive to be arrested and delivered up to the regularly constituted agent of the State from which he fled. The warrant of the executive under the great seal of the State, reciting the facts necessary, under the Act of Congress, to give him jurisdiction of the case, would, in my

In the matter of John Leary, Petitioner for *habeas corpus*.

opinion, at the hearing of the *habeas corpus*, be conclusive evidence of the existence of those facts, of his judgment in relation to them, and of a compliance with the Constitution of the United States and the Act of Congress. No investigation, therefore, in such a case, can be made beyond the warrant of the executive, and no examination into the facts and circumstances of the alleged offence with which the party stands charged." "In the present case, the return fully sets forth copies of all the documents transmitted by the Governor of Pennsylvania to the executive of this State, and the appointment of Schremer as the agent of the State of Pennsylvania to receive the petitioner as a fugitive from justice and to carry him to that State. It appears that all the requisites of the Act of Congress have been complied with. No suggestions or exceptions have been made to the return. It is therefore admitted to be true. And although my belief is, that the alleged offence with which the petitioner is charged is the same which, upon examination of witnesses at the hearing of the former *habeas corpus*, clearly appeared to be a breach of trust and not a larceny, he must be remanded because the return in this case is conclusive. When taken to Pennsylvania, he can obtain relief, if the circumstances of his case entitle him to it, by suing out the writ of *habeas corpus*."

The same view of the nature of the obligation and the imperative duty to make the surrender is declared in the following cases, in which, however, the exact point now in question was not directly involved, but from the views therein expressed the conclusiveness of the Governor's determination is properly to be inferred. *Kentucky v. Dennison*, 24 How., 66; *Johnson v. Reilly*, 13 Ga., 98; *Matter of Voorhies*, 32 N. J. L. R., 141. In the case of the *People ex rel. Lawrence v. Brady*, 56 N. Y., 182, the majority of the Court

In the matter of John Leary, Petitioner for *habeas corpus*.

of Appeals of New York do indeed express the opinion that on *habeas corpus* against the sheriff holding an alleged fugitive under the Governor's warrant, it is competent for the court to go behind the warrant and inquire into the fact and sufficiency of the charge of crime upon the evidence presented to the Governor, that is to say, the requisition of the Governor of the demanding State, and accompanying papers, and in that case they discharged the prisoner on the ground that such papers did not show that the facts alleged in the affidavit accompanying the requisition constituted a *crime* by the law of Michigan, the demanding State; but it weakens the force of this authority, that the point of the conclusiveness of the recitals in the warrant was not urged upon the court on the argument, and that the case was submitted by counsel as turning upon the question whether the affidavit did charge a crime by the law of Michigan. (See argument of the District Attorney, p. 185.) The court says (p. 186): "It was not claimed by the counsel for the people, that if the papers were defective and insufficient, it was not competent for the court to take cognizance of the question and discharge the prisoner." It is noticeable also that by the pleadings, the papers on which the Governor acted were voluntarily brought before the court, and by the demurrer to the traverse their insufficiency appears to have been admitted. The court also alludes to the fact that there was no indictment against the prisoner, but an affidavit only (p. 188). Now in some of the cases a distinction has been taken between a case based upon affidavit and one based upon indictment; that in the latter case the authentication of the demanding Governor is evidence that the facts charged constitute a crime in the demanding State, and in the former case it is not. This distinction seems to be based on the circumstance that an indictment is everywhere recognized

In the matter of John Leary, Petitioner for *habeas corpus*.

as the proper mode of proceeding for a crime, and therefore that the fact that the charge has been made in that form is to be taken in itself as showing that the facts constitute a crime, that is, an indictable offence. How far this distinction may have influenced the Court of Appeals in reaching the conclusion they came to in that particular case, and whether they would hold the same rule in case it appeared that an indictment against the party duly authenticated accompanied the requisition, cannot with certainty be gathered from their opinion. Judge Grover dissented from the conclusions of the court. The court says: "Courts have exercised the right to interfere and to examine the grounds upon which the executive warrant in such cases has issued, and the jurisdiction is justified both by reason and authority." They, however, do not give the reasoning by which they claim to justify it, and they refer for the authority relied on only to the cases of *Ex parte Smith*, 3 *McLean*, 121, and *In re Clark*, 9 *Wend.*, 219. The case of *In re Clark* does not, in my judgment, support the position taken by the learned court. It is true that in that case the court examined and *found sufficient* the facts alleged in the affidavits accompanying the requisition, as charging a crime under the laws of Rhode Island; the court did not discuss nor decide the point now in question, and so far as its opinion on that point can be inferred from the language of Chief Justice Savage, it would seem to be adverse to the position taken by the learned counsel for the petitioner. The papers were voluntarily laid before the court and it is to be observed that the charge was by affidavit and not by indictment. And it certainly is not so well settled by authority that the authentication by the Governor of an affidavit charging the party is under the statute to be taken as conclusive proof that the facts charged in the affidavit constitute a *crime* in the demanding State, where those facts

In the matter of John Leary, Petitioner for *habeas corpus*.

do not constitute a crime at common law, as it is in case of an indictment so authenticated. That question, however, does not arise in this case, since the offence charged here is by *indictment for burglary*, an acknowledged felony at common law. The case of *Ex parte Smith*, 3 McLean, 121, undoubtedly gives some support of authority to the position, that this court may go behind the warrant and inquire *whether the prisoner is a fugitive from justice*. There was, however, this peculiarity about the offence charged: It was a charge against Smith, the Mormon prophet, for being *accessory before the fact*, to a murder committed in Missouri, and it was not alleged in the affidavit that he was in Missouri at the time of the commission of the offence; nor was his presence at the time and place of the alleged offence necessarily to be inferred from the nature of the charge, if the charge itself was true. Whether the question of the party demanded having in fact fled from the justice of the demanding State is under the Act of Congress submitted to the conclusive determination of the Governor on whom the demand is made, or whether he can receive any evidence on that point outside of the papers submitted to him by the Governor of the demanding State, are questions, however, that do not arise in the present case, since the offence charged is one which necessarily implies the actual presence of the party indicted within the jurisdiction of the demanding State at the time of the alleged offence, and the better opinion seems to be that where such a charge by indictment is duly authenticated by the demanding Governor and the party indicted is in fact found in another State, this is certainly sufficient *prima facie* evidence of his having fled from justice within the meaning and for the purposes of this statute, perhaps conclusive on the court upon *habeas corpus* if not on the Governor. And in this case the prisoner has not overcome this *prima facie* case. So far as the cases

In the matter of John Leary, Petitioner for *habeas corpus*.

of *People ex rel. Lawrence v. Brady* and *Ex parte Smith* are opposed to the views above expressed, I think they are not sustained by reason or by the weight of authority. The *People v. Brady*, though followed by the general term of the first department, was in conflict with the view of the judges of the Supreme Court in that department, and its correctness on this point is still questioned by them. (*People ex rel. Connors v. Reilly*, 11 Hun, 94.) The case of Senator Patterson before Judge Humphreys of the Supreme Court of the District of Columbia, also referred to, seems to have turned on the question whether a person sent by a State to Congress as its Senator can be held to have fled from that State within the meaning of the Act of Congress. How that fact was brought before the court does not appear in the copy of the opinion furnished me. Other cases were cited upon the argument which it is unnecessary to discuss in detail. (*In re Hayward*, 1 Sandf. S. C. 702; *In re Solomon*, 1 Abb. Pr. N. S. 347; *In re Washburn*, 4 Jo. Ch. 106; *In re Leland*, 7 Abb. Pr. N. S. 64; *State v. Howell Charlton* (Ga.) 20; *Kingsbury's Case*, 106 Mass.; *Brown's Case*, 112 Mass. 409; *Dow's Case*, 18 Pa. 37; *Com. v. Deacon*, 10 S. and R., 125; *Vallid v. Sheriff*, 2 Mo. 26; *In re Greenough*, 31 Vt. 279. See also a discussion of this statute 6 Pa. L. J. 417.) It is not intended in this opinion to pass on the question whether the requisition itself is sufficient evidence to the Governor of the State on which the demand is made that the party charged has fled from justice, where the indictment or affidavit does not expressly or by necessary implication charge that the party accused was within the jurisdiction of the demanding State at the time of the commission of the alleged offence. There is a class of cases of which *Ex parte Smith* was one, apparently wholly outside the purview of the Constitution and Act of Congress, inasmuch

In the matter of John Leary, Petitioner for *habeas corpus*.

as the party cannot be said to have fled from the State making the demand. These cases are those in which a State has assumed jurisdiction to make an offence indictable, although the party charged was not then, and perhaps never was, within the State, as, for instance, for a murder where the fatal blow was struck outside the State but the injured party died within the State. Perhaps the only and the proper remedy of a party arrested under such a warrant in such a case is to apply to the Governor for a revocation of the warrant. All that is necessary to hold in this case as to this point of the party having fled from justice, is that where it appears by the recitals in the warrant that the Governor had before him a duly authenticated copy of an indictment against the party for an offence, the commission of which necessarily implies the presence of the party at the time and place of the alleged offence, and, as was the case here, no evidence is offered tending to show that the party is not a fugitive from justice, he is properly held under the warrant. It is not intended to be intimated that evidence that the party never was within the jurisdiction of the demanding State, would, if offered, be admissible on *habeas corpus* after the arrest on the warrant. One obvious objection that might be urged to the admission of such evidence is, that it would be apparently trying the question of an *alibi*, one of the possible defences of the party on his trial for the crime alleged, which, as involved in the question of his guilt or innocence, it may have been the design of the Constitution and the Act of Congress to remit for trial exclusively to the State in which the party stands charged with having committed the offence. And another objection might be urged, that Congress has apparently submitted the question whether the party charged has fled from justice to the determination of the Governor alone.

Vandover v. Wilmot.

The question of the identity of the party arrested with the party described as the alleged fugitive in the mandate of the Governor is, of course, always open to inquiry on *habeas corpus*, since that is simply the question whether the mandate has been executed against the party named therein; but on this question the fact has been determined against the petitioner on the evidence.

The writ must be dismissed and the prisoner remanded.

For the petitioner, *Peter Mitchell, A. S. Sullivan* of counsel.

For the sheriff, *H. W. Bookstaver, W. Britton* of counsel.

JANUARY, 1879.

JOHN N. VANDOVER vs. JOHN WILMOT.

BILL OF LADING.—DEMURRAGE.—AGENT.

V., the master and owner of a canal-boat at Oswego, employed F. & Co. to procure for him a cargo, and F. & Co. arranged with H. R. & Co., the proprietors of an elevator, to give the boat a load of grain for New York. F. & Co. gave V. an order on H. R. & Co. for the grain and he went to the elevator and loaded his boat. F. & Co. then made out a bill of lading in two parts, which were signed by V. and by F. & Co., each keeping one part. It consigned the cargo to W. in New York, and authorized him to detain the boat at the rate of \$3.00 a day for thirty days, and thereafter at the rate of \$2 00 a day till the 1st of April, and from that time demurrage was to be allowed at the rate of 2½ per cent per day on the freight. After V. had left with his boat, F. & Co. received from H. R. & Co. blank forms

Vandover v. Wilmot.

of bills of lading, which differed from the others as to the rate of demurrage after the 1st of April. F. & Co. filled up and signed these bills, naming H. R. & Co. as shippers, and sent them to H. R. & Co. and they forwarded one of them to W., to whom they consigned the grain. W. never received the bill of lading which V. had signed and delivered to F. & Co., because they had sent it to S., to whom they had made the freight and demurrage payable, as security for advances made by them to V. The boat not having been discharged till April 16th, V. filed a libel against W. to recover demurrage from April 1st, according to his bill of lading. The difference between the two bills of lading was accidental:

Held, That the first bill of lading must be held to be the contract between the parties and that W. should have been put on inquiry as to the contract, from the fact that his bill of lading did not purport to be signed by the master or by any one authorized to bind the boat;

That V. was entitled to recover the demurrage claimed.

CHOATE, J. This is a libel *in personam* by the master and owner of a canal-boat, against the consignee of the cargo, for demurrage, pursuant to the terms of the bill of lading. The libellant being at Oswego with his boat, employed there the firm of B. C. Frost & Co. to procure for him a cargo of grain, paying them a commission therefore. Frost & Co. made arrangements with Hagamon, Rundell & Co., the proprietors of an elevator in Oswego, to give the libellant's boat a load of grain for New York. They gave the libellant an order on Hagamon, Rundell & Co. for the grain, and he went there and loaded his boat. Frost & Co. then prepared and presented to the libellant a bill of lading in two parts, which were signed by the libellant and by Frost & Co. The libellant retained one and left the other with Frost & Co. This bill of lading named Frost & Co. as the shippers. It made the freight and demurrage payable to one Sargent, in New York, for the security of Frost & Co., who advanced money to the libellant for his expenses in reaching New York. The consignee named was the respondent, Wilmot. Frost & Co. had no interest in the cargo. Hagamon, Rundell & Co., who

were the shippers and consignors to the respondent, were acting as agents for the owners of the grain. With this bill of lading, which is the one on which the suit is brought, the libellant proceeded on his voyage to New York. By its terms, the consignee could detain the boat at the rate of three dollars a day for thirty days and thereafter at the rate of two dollars a day till the 1st of April, 1873, and from that time demurrage was to be allowed at the rate of $2\frac{1}{2}$ per cent per day on the freight. Soon after the libellant left with his boat, Frost & Co. received from Hagaman, Rundell & Co. blank forms of bills of lading, differing from that signed by the libellant in respect to the demurrage, giving the privilege of detaining the boat without limit of time, at the rate of two dollars a day after the first thirty days. Frost & Co. filled up and signed this bill of lading in two parts, naming Hagamon, Rundell & Co. as the shippers, and delivered them to Hagamon, Rundell & Co. One of these bills of lading Hagamon, Rundell & Co. forwarded with a letter to the respondent, to whom they consigned the grain. The respondent never received the first bill of lading, that signed by the libellant. The one retained by Frost & Co. had been forwarded by them to Sargent. The boat was detained till the 16th of April, the respondent having no knowledge that the libellant had signed or given a bill of lading differing from that sent to him by Hagamon, Rundell & Co. until about the 1st of April, when he had paid most of the freight and the demurrage up to that time. The suit is to recover the difference in demurrage between the two bills, being about eight dollars a day, from April 1st to April 16th. It appeared by the testimony of Mr. Frost, called as a witness by respondent, that the difference in the two bills was accidental; that there was no express agreement prior to the signing of the first bill of lading between them and the libellant as to demurrage, nor

NEW YORK,

between them and Hagamon when the second bill of lading was presented. They did not observe the first bill of lading of Hagamon, Rundell & Co. in the form of the second bill, but that this came from the first bill of lading, so far as Hagamon was concerned. It appeared by the testimony that Hagamon had had prior consignment of the cargo, and received from the second bill of lading. That the first bill of lading was not presented to him; that Frost & Co. were acting in this transaction, that the only bill of lading in force, in the second bill, was the second bill. That he received the consignment for a *quantum* of lading, because it is a bill of lading. But I do not know of lading entitled the cargo only Frost & Co. as the cargo. They were the cargo. They were Hagamon, Rundell & Co. in agreement with the master of the vessel in the position of brokers rather than in the position of agents for the master, they acted for the master as to the cargo. Frost testified

that it was customary for them in such cases, to give the master a memorandum as to freight, consignee, etc., on which he started on his voyage, and afterwards to make out and forward a formal bill of lading signed by them. Possibly, if the master sailed with such a memorandum and without signing a bill of lading, an authority might be implied from the circumstances for Frost & Co. as his agents, afterwards to sign and forward a bill of lading, but that is not this case. The bill of lading signed by the libellant, was in all respects a formal and complete bill of lading. It fixed the terms of carriage and demurrage. It left nothing which usually forms part of such an instrument to be agreed upon. And the whole matter of agreeing on the terms of the contract had been clearly left by the shippers to Frost & Co., who, with the libellant, signed this bill of lading. It is clear therefore, that Frost & Co. had no authority to alter its terms or to make a new contract without the consent of the libellant, and it was the contract between the libellant and the shippers, Hagamon, Rundell & Co., and it appears by the testimony of Frost, that there was no mistake in making it. It was, and the second bill of lading was *not*, the contract intended by the parties to be made, and in accordance with the form used by Hagamon, Rundell & Co. The fact that Frost & Co. were named in it as shippers, is immaterial. In a sense, they were the shippers, as agents for Hagamon, Rundell & Co. Then, as to the respondent, although he had not in fact seen the true and only bill of lading, and the paper received by him purporting to be such was void, not being signed by the master nor by his authority, yet he received the cargo, and could, on inquiry, have seen the bill of lading. It should have put him on inquiry that the paper he had was not signed by the master, nor by any one who, on its face, appeared to have the master's authority

The Italian Bark Vincenzo T.

to sign it. If he trusted in an instrument signed by a stranger, with no apparent authority to bind the master or owner of the boat, it was his own fault and the libellant should not suffer therefrom. As he accepted the consignment of the cargo without inquiry as to the terms of the contract between the boat and the consignor, he thereby assented to the terms of that contract, whatever it was, and is bound to pay the freight and demurrage accordingly.

Decree for libellant with costs.

For libellant, *W. R. Beebe*.

For respondent, *E. T. Wood*.

JANUARY, 1879.

THE ITALIAN BARK VINCENZO T.

BILL OF LADING.—DAMAGE TO CARGO.—STOWAGE.—PERIL OF THE SEA.—
BURDEN OF PROOF.

A piece of marble statuary was shipped at Leghorn on board a bark, packed in a wooden case, to be carried to New York. It had been packed at Carrara, and brought to Leghorn in a lighter. A bill of lading was given for it by the bark acknowledging the receipt of the case in good order, "measurement and contents unknown," and excepting perils of the seas. On the discharge of the case at New York, it was externally in good condition, but a rattling was heard in it, and on opening it the statuary was found to be broken, and the bark was libelled for the damage. The case was proved to have been well stowed. The bark met with heavy weather on the passage :

The Italian Bark Vincenzo T.

Held, That the burden was on the libellant to show that the statuary was in good condition when it was delivered to the bark; and that in the absence of such proof, and on the proof of good stowage of the case and of perils of the seas, the vessel was not liable for the damage.

CHOATE, J. This is a libel *in rem* to recover for damage to a piece of marble statuary shipped at Leghorn, for New York, alleged to have been broken by reason of bad stowage or negligent carriage. The bill of lading acknowledged the receipt of a case containing "marble works," in good order, "*measurement and contents unknown*." The piece of statuary was packed in a wooden case, and on delivery in New York it was found to be broken.

Under the bill of lading the burden was on the libellant to prove that when the case was delivered to the vessel its contents were in good order and condition. (*The Columbo*, 3 Blatch., 521; *Clark v. Barnwell*, 12 How., 272.) It appeared that the case was brought by a lighter from Carrara to Leghorn, and there shipped on board the bark. The master, mate and seamen were all examined and testified that it was carefully handled and properly stowed. It was stowed in the upper layer of the cargo and near the deck beams. The testimony also is that in discharging it was carefully handled. While it was being taken over the side of the vessel at New York, a rattling noise was heard in the case. The vessel encountered several very heavy gales. I think the libellant has not produced the necessary evidence that the piece of statuary was in good order and condition when delivered to the ship, and that the evidence does not warrant the conclusion that it was improperly stowed or negligently carried. Nothing is shown to have happened after its receipt by the ship which could have produced the injury, unless it be the rolling and pitching of the vessel, and, as the stowage is proved to be good, this (if the cause of

The Italian Bark Vincenzo T.

the injury) is not chargeable to the vessel under the bill of lading, which excepted perils of the sea. It is suggested that the case may, in the rolling of the ship, have been thrown up against the deck beams and thus the statuary been broken, and that it should have been placed further from the beams; but this is mere conjecture, and not a conclusion that can properly be drawn from the evidence. It is claimed that if it had been broken when received by the vessel, a rattling noise within the case would have been then heard. And one or more of the seamen testified that they heard no rattling when it was delivered to the vessel at Leghorn. I think, however, that this circumstance is not of sufficient weight to overcome the evidence that has been produced of the careful handling and stowage of the case. When delivered in New York, the case was externally uninjured and apparently in the same condition in which it was received on board. Whether the marble was broken before it was put on board, or by the rolling and pitching of the ship on the voyage, is not proven. The evidence is that it was packed in the case in a proper and usual manner, with wooden braces, but its form was such that the upper part of the marble, two feet and more in length, a slender cross, but weighing about a hundred and fifty pounds, could not be braced. This part of it was therefore peculiarly liable to breakage.

Libel dismissed with costs.

For libellant, *H. T. Schenck*.

For claimants, *W. R. Beebe*.

JANUARY, 1879.

JACOB HUS vs. OSCAR KEMPF.

FREIGHT.—BILL OF LADING.—MASTER.—POWER OF AGENT.—TENDER.

The master of a vessel filed a libel against the consignee of 97 casks of wine to recover freight for bringing them from Rotterdam to New York. The consignee set up in defence that seven of the casks were broken by reason of bad stowage, and their contents, to a greater value than the freight, lost; and he also set up a tender of performance of an agreement to settle the claim for the face of the bill of freight without interest. It appeared that the respondent ordered the wine of his correspondents at Neustadt, in Bavaria, to be shipped by first steamer. They sent it to Rotterdam, to brokers there to be shipped, and the brokers shipped it by the steamer of which the libellant was master, and took a bill of lading which excepted "insufficiency of package, leakage, breakage and perils of the sea." There was proof of good stowage of the casks, and that the vessel met with heavy weather, during which a noise was heard below, and on the hatches being opened, several of the casks were found broken. The respondent objected that the master could not sue for the freight in his own name:

Held, That, as the answer admitted that the contract was made with the master, no objection to his right to sue could be made;

That the brokers who were employed were authorized to bind the respondent to the usual stipulations limiting the carrier's liability, and the bill of lading was the usual form used by that line of steamers;

That, on the evidence, the breakage of the casks was due to perils of the sea or imperfection of the package;

That there was no proof of an accord and satisfaction which would have discharged the claim for freight;

That the tender, made after suit brought, could not avail the respondent, as it did not include interest and costs, and the money had not been deposited in court, as required by the rules of the court;

That the libellant was entitled to a decree for the amount of the freight.

CHOATE, J. This is a libel *in personam*, for freight according to bill of lading, on 97 casks of wine. The defence

Hus v. Kempf.

is that seven of the casks were broken by reason of bad stowage, and their contents, of value exceeding the freight, lost; and *secondly*, tender of the performance of an alleged agreement between the parties to settle the claim for the face of the bill of freight without interest.

The wine was ordered by the respondent of his correspondents at Neustadt, Bavaria, to be shipped by the first steamer. In pursuance of this order, his correspondents sent it to Rotterdam, to brokers there, with instructions to ship it by the first steamer for New York. The brokers shipped it by the Rotterdam, a steamer running in a regular line between that port and New York, the libellant being her master, and took a bill of lading which acknowledged the receipt of the wine "in good order and condition," "weight, measure, gauge, quality, condition, quantity, brand, contents and value unknown." It excepted, among other things, "insufficiency of package," "leakage," "breakage," "wastage" and "perils of the sea." The form used was a printed blank, which was proved to have been the form of bill of lading used by said line. It appeared that for eight years the respondent had been in the business of importing wines into the United States; that he had received them by this or other lines of steamers. Neither he nor his correspondents gave any special instructions as to the mode of shipment, nor as to a bill of lading or its form, except as above stated. It is objected that the brokers at Rotterdam had no authority to enter into the contract contained in this bill of lading with the master on respondent's account, and that therefore the ship and master were liable, generally, as carriers by water. This position cannot be sustained. The brokers were authorized to bind the respondent to the usual stipulations limiting the carrier's liability. It is objected that the libellant is not the party in interest and cannot sue for the

Hus v. Kempf.

freight in his own name. This objection is not open under the answer. The answer expressly admits that the contract of carriage was a contract with the libellant. The defence that the wine in the injured casks was lost by reason of bad stowage is not sustained. The bill of lading admits that the casks were received in good outward condition. There was no evidence as to their contents at the time of shipment. All that appears is that they left Neustadt filled and in good order, and that they were good and strong casks. No witness is called who saw them at Rotterdam, except the mate of the vessel, and he testified that they were well stowed on the vessel. The vessel had a very long and very rough passage. She lost spars and men. The second mate was washed from the bridge eight or nine feet above the deck. During a tempest a noise was heard below, and when the hatches were opened, several of the casks were found to have been broken. There is some testimony of experts here that the injury to the casks was, in their opinion, caused by improper stowage ; but upon the whole evidence, I think it is more probably to be attributed to the perils of the sea, or some defect in one or more of the casks. The libellant does not sustain the burden of proof which is upon him under this bill of lading. (*Vaughan v. 630 Casks of Sherry Wine*, 7 Ben. 506.) The tender made by respondent after suit brought cannot avail him as a tender, because it was insufficient in amount, not including interest and costs to that time, and because it was not made good by depositing the money in court according to the rules of this court. Nor is there evidence of an accord and satisfaction, which would have discharged the obligation for freight, nor of a new agreement between the parties discharging the old tender of performance. There seems not to have been an entire agreement as to the terms of a compromise.

The Schooner Uncle Tom.

Decree for libellant for the full amount of freight, with interest from March 3d, 1873, to be determined by a reference, the parties not agreeing as to the amount, and costs.

For libellant, *Butler, Stillman and Hubbard*.

For respondent, *C. B. Ripley*.

JANUARY, 1879.

THE SCHOONER UNCLE TOM.

SEAMAN'S WAGES.—REGISTERED OWNER.—SET OFF.

O. M. bought a schooner at Bermuda, took command of her, and brought her to New York. As she needed repairs, he obtained an advance of the necessary funds, agreeing to give a mortgage on her as security therefor. It was found that she could not be registered in the name of O. M., and he made a bill of sale of her to his brother, E. M., for the nominal consideration of five dollars, and procured E. M. to execute the mortgage. The mortgagees were told by O. M. that he had sold the vessel to his brother, and they had no notice that the sale was not a valid sale, except knowledge of the consideration stated in the bill of sale. After the mortgage O. M., who continued to control the vessel, shipped E. M. as cook and sailed on a voyage to Cuba and back to New York, where the vessel was libelled and sold for seaman's wages. The mortgagees intervened as claimants and objected to the payment of the claim of E. M. :

Held, That, although the claim of the mortgagees to the proceeds was superior to that of E. M. as owner, the claim of E. M. as a seaman was superior to that of the mortgagees, and there was no reason why it should not be recognized and enforced ;

That the liability of E. M. for a deficiency on the mortgage could not be set off against his claim for wages.

The Schooner Uncle Tom.

CHOATE, J. In this case the vessel has been sold on a libel for seaman's wages, and the question is whether one of the seamen, Edwin Meyer, is entitled to his wages out of the proceeds. His claim is opposed by mortgagees of the vessel, who have appeared as claimants and who hold a mortgage executed by the said Edwin Meyer, as owner of the vessel. Sometime prior to the making of the mortgage, the schooner was purchased at Bermuda, by one Otto Meyer, who took command of her and brought her to New York. As she needed repairs he contracted with the claimants to furnish the funds required for her repair, agreeing to give a mortgage on her therefor. When the vessel had been repaired it was found that she could not be registered in the name of Otto Meyer. He therefore made a bill of sale of her to his brother, Edwin Meyer, for the nominal consideration of five dollars, and she was registered in the name of Edwin Meyer. But Otto Meyer continued to manage and control her and had entire possession of her. In pursuance of the agreement to give a mortgage, Otto Meyer procured his brother to execute a mortgage to the claimants, telling them that he had sold the vessel to his brother. The claimants had no notice that the sale was not a real sale for value, unless knowledge of the fact that the consideration expressed in the bill of sale was five dollars, was such notice. The proceeds are insufficient to pay the mortgage, and the claimants take the point that the registered owner of a vessel cannot have a lien on his own property. After the mortgage was given, the vessel sailed on a voyage from New York to Cuba and return, under command of Otto Meyer. Edwin Meyer shipped as seaman, and served till the end of the voyage, as cook.

I think it clear, that his claim is superior to that of the mortgagees. The claimants took their mortgage plainly

The Schooner Uncle Tom.

enough subject to the superior claim that might attach against the vessel for the wages of the crew upon future voyages. And it is a matter of entire indifference to the mortgagees, so far as their interest was concerned, who the crew should be or what their relation to the vessel might be, or whether they might have an interest in her or not. There is, therefore, no equity in the claim that, because the cook happens to be the registered owner, he is any the less entitled to his wages as cook, as against these mortgagees. But for the accidental circumstance of his holding the legal title, his claim for wages would not and could not have been disputed by them. The vessel must have seamen, and there was nothing incompatible between the positions of seaman and registered owner. It is very true that the claimants' title as mortgagees to the proceeds is superior to that of the cook as owner; but the claim of the cook as seaman is superior to that of the mortgagees, and there is no reason why it should not be recognized and enforced. Under the English statute which gives the master a maritime lien for his wages and disbursements the same objection was taken to the libel of the master, who was a part owner, that is taken in this case; but Sir R. Phillimore held the objection untenable, both on the general ground that the nature of the maritime lien was such that an owner or part owner could have and enforce such a lien against the ship, and also on the ground that the statute, having given masters of ships in general terms a lien for their wages and disbursements, the court could not by construction engraft on the statute an exception, namely, in case of masters, who happened to be part owners. (*The Feronia*, 17 L. T. R. 620.) "Nor could it be contended," says the learned judge, "that under the old law a common seaman who was also a part owner (and such cases may often have happened) could have been on that account

The Schooner Uncle Tom.

deprived of his maritime lien for wages." Our statute, which recognizes the maritime lien of the seamen for wages, and provides for its speedy enforcement, is no less explicit than the English statute giving such lien to the master; and although an interest on the part of a seaman in the vessel is not so common as on the part of a master, there is no consideration of public policy or of reason for engrafting such an exception on our statute. (See Rev. Stat., §§ 4546 and 4547.) The further objection that this libellant cannot recover because he is liable to the mortgagees for a deficiency on the mortgage, seems to be based on the theory that such a claim in contract can be set off against a claim for wages; but the nature of the claims is entirely different, and they are not the proper subject of set off. And such ground for withholding wages is in effect inconsistent with those provisions of our law which are designed to secure to the seamen their absolute right to their wages. (See Rev. Stat., §§ 4535 and 4536.)

Decree for libellant with costs.

For libellant, *H. Heath*.

For claimant, *Edward S. Hubbe*.

JANUARY, 1879.

THE STEAM-TUG H. W. EDYE.

EXECUTION OF CONTRACT.—CONDITIONAL DELIVERY.

L., as agent for the owners of a steam-tug, conferred with T., in reference to a charter of the tug by T. and others. The terms of the employment were agreed upon between them. L. had insisted that security should be given for the payment of the charter money, and, T. having proposed one Lewis as surety, L. and T. met at his office, where the charters were drawn up in duplicate and signed, Lewis signing as witness, and each took his part of the charter. When L. saw that Lewis had signed only as witness, he objected, and declared that the affair should go no farther, and that the boat should not leave the port till security was given. The boat had already gone to Hoboken to take in coal for the voyage, but the security not being given, she went no farther, and T. and his associates filed a libel against the boat to recover damages for the refusal of the owners to perform the charter :

Held, That, on the facts, the charter was not completely executed, and that the action could not be maintained.

CHOATE, J. This is a libel by David W. Terhune and others, against the steam-tug H. W. Edye, to recover damages caused by the alleged refusal of the owners of the tug to permit the tug to leave the port of New York, and for retaining her from the libellants after the said owners had executed and delivered to the libellants a charter party granting the use of her for some five months to run on the river Kennebeck and after the said tug had entered upon the performance of said charter party. Among other defences the claimants alleged that the charter party sued on was never executed and delivered by them. The libellants have produced a paper purporting to be a charter party and com-

The Steam-tug H. W. Edye.

plete in form, under seal, the parties to which are recited to be "L. and F. Luckenback, agents of the steam propeller H. W. Edye, parties of the first part, and D. V. Terhune and Robert Wylie, parties of the second part," and signed by L. and F. Luckenback and D. V. Terhune and witnessed by John H. Lewis. L. and F. Luckenback are conceded to have been the agents of the tug, having authority to charter her. The charter is dated May 13, 1876.

It appears that the negotiations prior to the signing of the charter were between Mr. Terhune on the part of the libellants and Mr. Lewis Luckenback on behalf of the claimants, that those negotiations were for the chartering of two boats and extended through several days; that Terhune and Wylie were strangers to Luckenback and resided in Boston; that the boats were wanted for the ice business on the Kennebeck river, for five months or more, the charter price of the boats, as finally agreed upon before the signing of the charter parties, being \$925 per month. It appeared also that from the beginning of these negotiations Mr. Luckenback had insisted that the libellants should give security for the performance of the charters on their part, and that the boats would not be chartered except on such security. Terhune at first proposed as surety one Starks W. Lewis, whom Luckenback accepted. Afterwards he represented that there was some difficulty in getting Starks W. Lewis and proposed Mr. John H. Lewis, whom, after inquiry, Luckenback agreed to accept. On this point of a prior agreement to give security, Mr. Terhune's denial is overborne by so great a weight of evidence that I consider the point proved in favor of the claimants beyond any doubt whatever, and it is in accordance with all the probabilities deducible from the circumstances and the nature of the transaction. The terms of the charters having been arranged,

'The Steam-tug H. W. Edye.

Luckenback and Terhune met at the store of John H. Lewis on the 13th of May, to execute the papers. Terhune had previously drawn up the charters for the two boats, two copies of each. Mr. John H. Lewis was present at this interview. The charters were read over by Mr. Luckenback and Mr. Terhune, and the copies compared and found to be correct. Mr. Wylie was not present. In accordance with an arrangement made the previous day, he had gone with the boats, which were still under the command of the claimants' masters, to Hoboken to take in their coal, in order to be in readiness on the completion of the business of the charters to proceed at once to the eastward. It is claimed by Terhune that he had authority to sign for Wylie and that Luckenback assented to his doing so, and that the charter parties are valid and binding although not signed by Wylie. It is unnecessary to consider these questions in the view that is taken of the case.

The principal question in the case is whether what took place at Lewis's store at that interview amounted to an execution and delivery of the charter parties. Terhune's statement is that he and Luckenback signed the charter parties; that they handed each to the other the papers thus executed by them; that Luckenback took his two parts and Terhune his; that nothing whatever was said about security; that Lewis witnessed the papers at their request and that Luckenback went away; that it was only afterwards when Luckenback returned, after an absence of half an hour or more, that he demanded security. In this he is corroborated to some extent by Mr. Lewis. Luckenback's statement is that Lewis was not asked to sign as a witness; that when he saw, after Lewis had signed, that he had signed merely as a witness, he objected that it was not according to the agreement; that he was to be the surety, and that after some discussion

The Steam-tug H. W. Edye.

he declared that the matter should go no further and that the boats should not leave till security was given.

The evidence is conflicting, but one fact I consider clearly proved, that the parties met upon an agreement distinctly understood between Terhune and Luckenback, but apparently not communicated by Terhune to Lewis; that Lewis was to become the surety on the charters; that he was to sign them in that capacity. This purpose there is not the slightest reason on the evidence to believe, had been abandoned by Luckenback, and this circumstance adds great probability to the truthfulness of his account of the affair. I consider Terhune substantially discredited, especially by the evidence in relation to the agreement to give security; and after a careful consideration of all the testimony I am satisfied that Luckenback's account is correct and that Lewis is mistaken on this point, and that his recollection is at fault as to the time when the objection as to security was made by Luckenback, and which he places at the subsequent interview, when Luckenback returned. There is a great deal of evidence, mostly circumstantial, which has been produced as bearing on this question, but which need not be reviewed in detail. It has all been carefully considered. If this is the true view of the case, there was no valid execution and delivery of the charter parties. The fact that they are in form complete; that they are signed, and that the several parts are in the possession of the two parties, is not conclusive of execution and delivery. It may be explained, and I think in this case it has been successfully explained by the claimants. The charter parties were never completed according to the intention of the parties as they met there for their execution. The signing and passing of them over was not with intent nor understood by either party to be with intent to deliver and give them effect as

The Schooner Kalmar.

perfect instruments, but preliminary only to the signing by a surety which never took place.

Libel dismissed with costs.

For libellants, *W. R. Beebe*.

For claimants, *T. E. Stillman*.

Eastern District of New York.

JANUARY, 1879.

THE SCHOONER KALMAR.

HALF PILOTAGE.—LIEN.—VESSEL BOUND THROUGH HELL GATE.

A claim for half pilotage by a Hell-Gate pilot, under the statute of the State of New York, constitutes a lien upon the vessel.

But to establish such claim it must be shown that at the time of the tender of the pilot's services, the vessel was in the prosecution of a voyage which would carry her through Hell Gate.

BENEDICT, J. The principal question presented for determination in this case is whether a lien upon the vessel attaches to a claim of a Hell-Gate pilot for half-pilotage.

The adjudications of the Supreme Court of the United States upon the subject of half-pilotage establish the following conclusions: The right to half-pilotage is a right depending upon a *quasi* contract. (*U. S. v. Jelliffe*, 2 Wall. 457.) It arises out of an implied promise raised by statute

The Schooner Kalmar.

to pay the amount specified by the statute. (*Ex parte McNeil*, 13 Wall. 242.) The contract is a maritime contract, and for that reason within the jurisdiction of the admiralty. (*Ex parte McNeil*, 13 Wall. 243.)

From these adjudications the conclusion follows that the consideration of the promise is the exertion of the pilot to reach the vessel for the purpose of placing at the disposal of the vessel the pilot's knowledge and skill. Such being the consideration of the promise, the liability of the vessel attaches according to the general rule of the maritime law by which the vessel herself is held responsible for the contracts of the master entered into for the benefit of the vessel.

To this rule there may be some exceptions, but no reason is suggested upon which to found an exception in cases of this description. The responsibility of the owner is not increased by the existence of the lien, and upon the theory at the foundation of the law of compulsory pilotage a claim of half-pilotage would be entitled to be protected equally, to say the least, with any other class of demands.

But it is said the right to half-pilotage depends upon a statute of the State, and as that statute does not declare the vessel bound, there is no lien. I am unable to see how the presence or absence of a provision for a lien in a statute of the State can affect the question whether a maritime lien attaches by reason of the contract in question. The existence or non-existence of a lien in connection with any class of maritime contracts is to be determined for the United States by those courts of the United States having jurisdiction in all cases of admiralty and maritime jurisdiction. (*The Lottawana*, 21 Wall. 558.) In determining such a question the courts of admiralty resort to those principles found embodied in that venerable law of the sea, which, with proper qualifications, is received with the binding force of law in all

The Schooner Kalmar.

countries, (see opinion delivered by Bradley, J., *The Lottawana*, 21 Wall. 574); and in that law there is no rule of more general application than the one which declares the vessel bound by the contract of the master entered into for the benefit of the vessel and upon her credit.

The nature and object of the rule requires that no such case should be treated as an exception without good reason, and no reason whatever for the exception in the case of demands of the character under consideration has been suggested here. Moreover, the existence of a lien in connection with a demand for pilotage has been often declared, and no ground is discovered for a sound distinction between a claim for full pilotage, and a claim for half-pilotage, as that claim has been interpreted by the Supreme Court of the United States. The absence of any distinction has been expressly declared by high authority. Says Judge Lowell, in the case of the *America* (1 Lowell 177), which was an action for half-pilotage: "This is a suit for pilotage—that is, a pilot's fee—not, indeed, for services actually rendered in piloting a vessel, but for an offer which the law makes the equivalent of such actual service."

The claim under consideration is, then, a demand for pilotage and it is covered by the 14th General Admiralty Rule, where the right to proceed *in rem* against the vessel for pilotage is declared by the Supreme Court of the United States. It is only necessary to add that in *Ex parte McNeil*, as appears by the opinion (p. 237), the question of lien was presented to the court. But the case was one *in personam*, and it was unnecessary to determine whether the libellant had or had not a lien, therefore no opinion was expressed on that point. Nevertheless, considering that the proceeding was for a prohibition taken for the sole purpose of obtaining from the Supreme Court its direction in regard to

The Schooner Kalmar.

demands of this character, and looking to the language of the opinion delivered, it may well be supposed that if any doubt had been entertained as to the existence of a lien in this class of cases it would have found expression in the opinion of the court. It is also to be noticed that the decision of the court in *Ex parte McNeil*, is made to turn upon the proposition that contracts relating to pilotage are within the sphere of the admiralty jurisdiction, thus affirming the absence of any distinction between a claim for half-pilotage and one for pilotage proper.

For these reasons the demand of the libellant would be upheld and a decree rendered against the vessel for the amount of the demand, but that there is an exception to the libel upon the ground that it fails to aver that at the time of the alleged tender of service by the pilot the vessel was engaged in the prosecution of a voyage that would carry her through Hell-Gate. The libel is in this respect similar to one considered by this court in the case of *The Traveller* (6 Ben. 280), where a similar objection was taken and sustained. The exception must therefore be sustained in this case, and it is fatal to the action as it stands. Nor will it be of any avail for the libellant to apply to have the libel amended so as to conform in this particular to the facts proved, for upon looking at the evidence I find it insufficient to sustain the other averments of the libel.

The libel must therefore be dismissed and with costs.

For libellant, *Beebe, Wilcox & Hobbs*.

For claimant, *Scudder & Carter*.

JANUARY, 1879.

THE PROPELLER JOSEPH HALL.

SEAMAN'S WAGES.—SEIZURE OF VESSEL.

A pilot was employed on a propeller, engaged in making short trips in and about the harbor of New York, by the month. His month expired on Sept. 24th. On Sept. 25th, the boat was seized by the marshal under process issued on libels against her. She at once stopped running. Her master abandoned her and the rest of the crew libelled her for their wages. The pilot, who had been living on board, thereafter lived at home, but he went on board the boat every day of his own accord, and pumped her out. The vessel being sold by the marshal, the pilot claimed to recover wages up to the time of her sale:

Held, That the libellant had reasonable notice on the seizure of the boat that his services as a pilot were no longer required, and his right to wages terminated at that time.

BENEDICT, J. In this case a lien creditor, having a demand against this vessel, inferior in rank to the claim of the crew, and which will be reduced by the amount paid the crew because the proceeds of the sale of the vessel are insufficient to pay all the liens in full, presents to the court the question whether the pilot of the boat is entitled to recover wages up to the time the boat was sold by the marshal, or only up to the time of her seizure, under the process issued upon libels filed against her.

The decision of this question must depend upon other facts than the fact that the boat of which the libellant was pilot was seized by the marshal on a certain day. The mere fact that a vessel is seized by the marshal by virtue of process *in rem* is not sufficient to terminate the contract with

The Propeller Joseph Hall.

the seamen composing the crew at the time of such seizure. But there may be circumstances attending the seizure known to the seaman, equivalent to notice to him that his services will no longer be required by those who employed him; and in such case the seaman will be deemed discharged and entitled at once to pursue the vessel for whatever may then be due him.

In this case the circumstances are these: The boat was engaged in making short trips from New York up the North River to Jersey City and to ports on the Sound. The pilot was hired by the month, and not for any specific period. His month expired Sept. 24th. On Sept. 25th, the boat was seized under a libel, and upon the seizure the boat stopped running. The master left her; the rest of the crew at once libelled her for their wages, and the boat was wholly abandoned by her owners. From that time the pilot, who had up to that time lived on board the vessel, lived at his own home, but during the custody of the marshal and up to the 10th of October, he went on board the boat daily and pumped her out. This he did of his own volition and not by any direction of the owners, nor is there any evidence that the service was required by the condition of the vessel. Within a few days after the seizure the libellant sought other employment, although without success. It does not appear that what the libellant did in the way of pumping or otherwise on board the vessel, formed any part of the labor usually performed by him in the capacity for which he was hired.

These circumstances are sufficient to show that the libellant had reasonable notice that his services as pilot would no longer be required on board the boat, and his right to wages must be deemed to have terminated at the time of the seizure of the boat by the marshal and her abandonment by her owners.

The Ship Blue Jacket.

In the case of the *Monte Christo*, referred to by the libellant, there was evidence of an express request by the owners that the seamen remain on board notwithstanding the seizure by the marshal.

For libellant, *Noah Tebbetts*.

For creditor, *Alexander & Ash*.

JANUARY, 1879.

THE SHIP BLUE JACKET.*

DAMAGE TO CARGO.—PERILS OF THE SEA.—NEGLIGENCE OF MASTER.—
SURVEY.

A quantity of sacks of barley were shipped at San Francisco, to be carried to New York, under bills of lading which excepted perils of the sea. The ship met with heavy weather and began to leak before she reached the Horn, and put into Rio in distress. A survey was had, which recommended that the cargo be discharged until the leak should stop or the ship should be in ballast trim. Accordingly, all the cargo was discharged except 3,093 sacks of barley forming the ground tier, with some at the ends of the ship. A second survey was then had, which reported that the underside of the ground tier was damaged by sea-water, but recommended that all the cargo, damaged or not damaged, should be taken forward. The ship was then repaired, the cargo was reloaded, it being all then dry, and the voyage completed. On the discharge of the cargo at New York it was found not only that a portion of it had been damaged by salt water, but that the rest of it, though in external appearance undamaged, had to a great extent lost the malting quality, and it was sold at auction at a loss, and libels were filed against the ship to recover the damage :

*Affirmed on appeal to the Circuit Court, July, 1880.

The Ship Blue Jacket.

Held, That, as to the cargo which appeared to have been wet with sea-water, the ship was not responsible, because it came from the leak, which was a peril of the sea ;

That, as to the destruction of the malting quality, the cause of it appeared to be the leak, which, causing a damp atmosphere in the hold, had led to the germination of the grain, and that the presumption was that the leak had caused that damp atmosphere before the ship arrived at Rio, and that there was no evidence to overbear that presumption ;

That, on the proofs, the master, having followed the advice of a duly constituted survey in good faith, could not be held negligent in taking in the cargo that had been discharged without taking out the ground tier ;

That the action could not be maintained, inasmuch as no breach of duty on the part of the master had been shown.

BENEDICT, J. These two actions, which were tried together, are brought by David Jones and by Adam Neidlinger *et al.*, the owners of certain sacks of barley shipped in San Francisco upon the ship Blue Jacket, to be transported therein to the city of New York, and there delivered in like good order as received.

The bills of lading admit the reception of the barley in good order and agree to deliver it in New York, perils of the sea excepted.

The number of sacks consigned to the libellant Jones was 9,087 ; the number consigned to Neidlinger was 16,822. All are proved to have been well stowed in San Francisco, and when the ship sailed she was sound and staunch. On the voyage the vessel met with heavy weather and began to leak before she reached the Horn. The leak increased so that finally she was compelled to bear up for Rio in distress. She arrived in Rio in distress on the 15th of January, 1877, and a survey was had by which it was recommended that the cargo be discharged until the leak should stop or the ship be in ballast trim. In accordance with the recommendation of the survey 22,817 sacks of barley besides other cargo were taken out, leaving in the ship 3,093 sacks, forming the ground

The Ship Blue Jacket.

tier, with some at the end of the ship. After the discharge of this part of the cargo a second survey was had; according to that survey some of the barley and wool amidships was then slightly damaged, and the under side of the lower tier in the lower hold was damaged by sea-water. The recommendation of the survey was that all the cargo, damaged or not damaged, be taken forward to its original destination. In accordance with this recommendation the ship went upon the dock on the 16th of February, and was then repaired. On the 1st of March she began to take in her cargo again, and on the 18th of March she sailed for New York, where she arrived in safety on the 11th of May, and without any further damage from perils of the seas.

Upon the discharge of the barley in New York two kinds of damage were disclosed. Some of the sacks showed ordinary sea damage, caused by sea water having leaked into the vessel and upon the sacks. In the view I take of this case, it is immaterial what number of sacks were damaged from this cause. The remainder of the barley, constituting the greater part of the cargo, was bright, hard and in external appearance sound and undamaged. Upon testing the barley for that purpose, however, it was ascertained that the great proportion of the grains had lost the malting capacity, and consequently the barley was unfit for malting and unmerchantable as barley for malting purposes. Whereupon it was all sold at auction and brought from 47 to 55 cents per bushel, the market price of merchantable barley fit for malting being then \$1.10 per bushel.

These actions are brought to recover of the ship the loss as disclosed by the auction sale. In my opinion they cannot be sustained, and for the following reasons:—In regard to that part of the barley with which sea water came in contact, of course the ship is not responsible, because no sea

The Ship Blue Jacket.

water reached the cargo except through the leak which occurred before the ship put into Rio, and that arose from a peril of the seas. In regard to the destruction of the malting capacity of the rest, the ship is not responsible, for the reason that, if the cause of this condition of the barley can be inferred from any facts proved, that cause was the sea water that leaked into the vessel, which, by creating a damp atmosphere in the hold, started germination in the grain, and that being thereafter stopped, would never start again. As germination in grain is the natural result of dampness, accompanied with the heat of the hold, the proximate cause of the injury was the peril of the sea.

But it is contended that no damage would have ensued if the portion of the cargo that had been wet by the leak had been abandoned in Rio, and that it was negligence to stow barley that had not been wet upon the lower tier which had been wet, for which negligence the ship is liable. The sufficient answer is, that the evidence will not warrant the conclusion that the presence in the ship during the passage from Rio to New York of the barley that had been wet by the leak was the cause of the destruction of the malting capacity of the grain.

The libellants' claim is that wetting of the lower tier, together with heat, caused the destruction of the malting capacity. But there was wetting and heat before the ship reached Rio, and the presumption is that such wetting and heat then produced its natural result.

When, therefore, it is sought to hold the ship liable upon the ground that such result occurred after the ship left Rio, the burden is upon the libellants, to show such to be the fact. That has not been done. For all that has been here proved, the condition of the barley when reloaded in Rio was the same as its condition when landed in New York. Indeed

The Ship Blue Jacket.

there is direct evidence that such was the fact, and there is no ground to contend upon the evidence that any of the grain was wet when the cargo was reloaded at Rio. The circumstances combine with the positive evidence to show that all the cargo was then dry. Moreover, not only is it impossible to find upon this evidence that the loss of malting capacity in the barley was caused after the ship was reloaded in Rio, but it is also impossible to find the master guilty of negligence in regard to the reloading. Rio, it must be recollected, was a port of distress. The condition of the ship and cargo upon arrival in Rio forced upon the master of the ship the question whether to abandon the barley that had been wet or to carry it forward. Upon this question he took the advice of competent persons given in due form after survey. The advice of the survey was that all the barley be carried forward in the ship. The integrity of the surveyors is not called in question by any testimony to the contrary. No witness who saw the condition of the cargo in Rio is called to say that what was done was not what the facts as they then appeared indicated to be the best course to pursue.

The master followed the advice of a duly constituted survey. His good faith is not disputed. How, then, shall it be said that he was guilty of negligence? The advice of a fair, competent and disinterested survey is always considered to be strong evidence in justification of a course adopted by the master of a ship in a port of distress. (*The Amelie*, 6 Wall. 27.) If, contrary to his own judgment and contrary to the opinion of experienced persons called to hold the surveys, the master of this ship had sold or abandoned any part of the barley at Rio, could he have made answer to the charge of not performing the contract in the bill of lading? And if not, can he now be held guilty of negligence in omitting to do what it would have been negligence to have done?

The Ship Blue Jacket.

If there were testimony to show a defect in the manner of restowing the cargo at Rio, or if it had been proven that the cause of the damage in question was the use of the old sails for dunnage, upon which counsel laid stress, there would then be ground for the contention that the ship is liable because of the negligence on the part of the master. But the testimony fails to make out such a case.

Upon the evidence it is impossible to say that any different mode of restowing the cargo at Rio should have been adopted. The point endeavored to be made is, not that the cargo carried from Rio to New York should have been stowed differently in Rio, but that there was negligence in permitting the barley that had been wet to form a part of that cargo. In view of the result there may be those who entertain the opinion that it was a mistake on the part of the master to attempt to carry forward the barley that had been wet, and that the result of that mistake is seen in the damage sued for. But if, as it turned out, a mistake was committed in this particular, and if the damage in question is the result of such a mistake—two propositions by no means certain—it does not follow that the master exhibited in this particular such a want of reasonable skill, diligence and care as to convict him of neglect of duty in the premises. In order to maintain this action against the ship, a breach of duty on the part of the master must be shown. (*Notara v. Henderson*, 1 Aspinwall 278.)

The libels must be dismissed, with costs.

For libellants, *Scudder & Carter* and *W. W. Goodrich*.

For claimant, *Benedict, Taft & Benedict*.

JANUARY, 1879.

ADAM NEIDLINGER ET AL. VS. THE INSURANCE COMPANY OF NORTH AMERICA.*

MARINE INSURANCE.—DAMAGE BY ACTUAL CONTACT OF SEA WATER.—
DAMPNESS OF A SHIP'S HOLD.

The shipper of a cargo of barley, in sacks, from San Francisco to New York, insured it against perils of the seas. The policy contained a memorandum clause by which grain was to be "free from average unless general," also "free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils," also "subject to 20 per cent particular average." The ship, met with heavy weather on the voyage and put into Rio, leaking, where, part of her cargo having been discharged, she was repaired and then, having been reloaded, she completed the voyage to New York. On the discharge of the cargo, a portion of the sacks were found to have been wet with sea water, and the barley in them damaged thereby, but the damage on that part of the cargo did not equal 20 per cent of the property insured. But it was found that the malting quality of the rest of the cargo had been destroyed, as it was claimed, by dampness of the hold, arising from the leak, and such damage amounting to more than 20 per cent, a libel was filed against the underwriters to recover the whole loss:

Held, That, assuming that the damage to the sacks of barley, which were not reached by the sea water, was caused by damp vapor arising from other sacks that were reached by the sea water which came into the vessel through a peril of the seas, such damage was not caused by actual contact of sea water with the articles damaged, within the meaning of the policy; and that the insurance company was not liable on the policy.

The cases of *Woodruff v. The Com. Ins. Co.*, and *Carey v. The Boylston F. and M. Ins. Co.* (101 Mass. 143) commented on.

BENEDICT, J. In October, 1876, the libellants obtained from the defendant by open policy and certificates, insur-

*Affirmed on appeal, July, 1880.

Neidlinger, *et al.*, v. The Insurance Company of North America.

ance to the amount of \$17,600 $\frac{00}{100}$ upon 21,068 $\frac{43}{8}$ bushels of barley from San Francisco to New York on the ship Blue Jacket. The policy was in the usual American form against perils of the seas. By the memorandum clause grain of all kinds was warranted by the assured "free from average unless general," and also "free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils." The memorandum was qualified by the certificates, which contained the words, "Subject to 20 per cent particular average."

The barley was shipped in sacks, and the bills of lading issued therefor described the property as so many sacks of barley. There was other barley in the ship—also shipped in sacks—and there was some pig lead, wool, rags, borax and other cargo. The barley was stowed in tiers, the lower tier resting upon a grain ceiling over the pig lead, old sails being spread for dunnage between the ceiling and the ground tier of barley. During the voyage and while the ship was in the South Atlantic, she sprung a leak through a peril of the seas, and thereby sea water was taken into the hold, which came in actual contact with those sacks of barley composing the lower tiers, and with some in the wings. In consequence of the leak, the vessel bore up for Rio, where she arrived on the 15th day of January, having experienced heavy weather and having at times had from 22 to 24 inches of water in her hold. Upon arrival in Rio all the cargo except the barley composing the lower tier and some in the after end of the ship was taken out. The ship was then docked and repaired. The barley and other cargo taken out was then restowed in the ship, and on the 18th day of March the ship sailed for New York, where she arrived without further disaster on the 11th day of May. Upon discharging the cargo in New York, cer-

Neidlinger, et al., v. The Insurance Company of North America.

tain of the libellants' bags, especially those composing the lower tier, showed marks of sea water, and were caked and badly damaged by actual contact with sea water.

The evidence will not permit the conclusion that of the libellants' bags a greater number than 5,360 were in actual contact with sea water. Indeed, it is quite evident that the number of bags so damaged was less than 5,360. The rest of the barley was bright in color, and to all external appearance merchantable. But by testing samples it was discovered that the malting quality of the barley had been destroyed, and in consequence it was unsaleable as merchantable barley fit for malting. Accordingly all was sold at auction, when it brought a price far less than the market price of barley fit for malting.

This action was then brought by the owners of the barley against the underwriters, to recover for the loss upon the barley insured by them, as ascertained by the auction sale.

In regard to the 5,360 sacks above mentioned, it may, for the purposes of this case, be considered to have been proven that the damage was caused by actual contact of sea water with those sacks. In regard to the damage to the remainder, it may, for the purposes of this case, be considered to have been shown to have been caused by dampness in the ship's hold. The most favorable view for the libellants is to consider the evidence as warranting the inference that the sea water which leaked into the ship prior to her arrival at Rio, by creating a damp atmosphere in the hold caused germination to commence in the barley, which being thereafter checked by heat, left the barley dry, bright, and to all appearances sound, but incapable of further germination.

It is conceded that the loss on the 5,360 sacks is not sufficient to charge the underwriters—that loss not amounting to 20 per cent of the property insured. But if to the loss

Neidlinger et al. v. The Insurance Company of North America.

on the 5,360 sacks there be added the loss on the remainder, arising from the destruction of the malting capacity, then the amount of loss is sufficient to warrant a recovery upon the policy. The question to be determined, therefore, is, whether the underwriter is liable upon the policy for damage to sacks of barley that were never reached by the sea water, assuming it to have been shown that such damage was caused by damp vapor arising from other sacks that were reached by the sea water which came into the vessel through a peril of the seas. Was such damage caused by actual contact of sea water with the articles damaged, within the meaning of the warranty in the policy contained? If so, the libellants are entitled to recover; otherwise, not.

The question thus presented does not appear to have been passed on in the National courts of the United States. It has, however, been considered in the State courts, and the cases there adjudged deserve respectful attention. It will conduce to the understanding of those cases to notice the circumstances under which the warranty in question came to be inserted in policies of insurance, and then to examine in chronological order the adjudications made in regard to the effect produced by the provisions.

In the year 1851 a question arose in the English courts in regard to the liability of an underwriter in a case where hides and tobacco had been shipped together, and the tobacco was injured in flavor by a fetid odor arising from the hides, which had been wet by sea water shipped during the voyage by peril of the seas. The policy contained no limitation of the underwriter's liability other than that contained in the ordinary memoranda, and the plaintiff recovered, upon the ground that the natural and almost inevitable cause of the flavor communicated to the tobacco was the access of sea water to the hides by a peril of the sea. Under such a policy

Neidlinger *et al.* v. The Insurance Company of North America.

it is not necessary, said Martin, B., "that sea water should be in absolute contact with the injured article." (*Mantoza v. Lond. Ins. Co.*, 6 Exch. R. 459.)

In the same year the case of *Biker v. The Manufacturers' Insurance Company* came before the Supreme Court of Massachusetts (12 Gray 603), when the liability of the underwriter was asserted in respect to damage to delicate French goods arising from an extraordinary formation of steam and gases occasioned by an extraordinary access of sea water to the hold, caused by perils of the seas.

In consequence of these decisions—as it has been supposed, and as the language of the warranty indicates—the warranty under consideration was thereafter inserted in policies, whereby the property insured is "warranted by the assured free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged occasioned by sea perils."

In 1858 the effect of this warranty came to be considered by the Court of Common Pleas in the city of New York, in the case of *Woodruff v. The Commercial Insurance Co.* (2 Hilt. 130), and upon that case the libellants in this action place their chief reliance. The action was upon a policy similar to the one here sued on, to recover for damage to wheat loaded in sacks. The evidence disclosed three kinds of injury. Some of the sacks were damaged by sea water leaking upon them; other sacks were damaged by dampness arising from the sacks that had been in actual contact with sea water; and there was damage caused by effluvia that arose from hides forming part of the cargo which had been wet by sea water through a peril of the sea. The judgment of the court was that the underwriters were not liable for the

Neidlinger et al. v. The Insurance Company of North America.

damage caused by the effluvia from the hides, but were liable for the other damage.

The ground upon which the court based the distinction drawn between the damage caused by effluvia and that caused by dampness, is to be found in the opinion delivered by Brady, J., where it is said: "If sea water be communicated by absorption, or makes its way upon any other principle of natural philosophy from the articles wet to any part of the same article, the actual contact contemplated by the policy is created." The same idea is conveyed by the language used in the opinion delivered by Judge Ingraham, when, in concurring with Judge Brady, he says: "The dampness referred to in the warranty is dampness to the article when it has come in contact with sea water."

From these expressions it may be inferred that no damage was considered by the Court of Common Pleas to be chargeable to the underwriter, except such as appeared to have been caused by sea water that had been communicated from one bag to another by absorption, or upon some other principle of natural philosophy; and it seems difficult to understand how the court reached its result upon any other ground.

It is not stated in the opinions that the shipment, constituted as it was, of various sacks of wheat, was considered to be a single article; and unless the decision was that the sea water had passed to all the sacks allowed for in the judgment, it would seem that the sacks damaged by effluvia would have been placed in the same category with those damaged by the vapor of the water,—the effluvia, as well as the vapor, being the natural result of the sea water in the ship. If this be the ground of the distinction that was there made between the damp sacks and those damaged by effluvia only, the case affords little support to the libellants here, for

in this case the question is in regard to bags of grain to which sea water was never communicated by absorption or otherwise.

But however the case of *Woodruff v. The Commercial Ins. Co.* may be understood, its weight as authority in favor of the libellants is more than counterbalanced by the decision of the Supreme Court of Massachusetts in the subsequent case of *Cory v. Boylston Fire & Marine Ins. Co.* (decided in 1871, and reported in 101 Mass. Rep., p. 146, also in 9 Am. Rep., p. 14).

This was a case upon a policy of insurance similar to that issued to libellants. The loss sought to be recovered arose from damage to champagne wine packed in cases and valued by the case. The ruling was that under such a warranty "it is not enough to bring a case within this clause that perils of the seas should be the efficient and, within the rule laid down in the previous decisions, the proximate cause by which the sea water was shipped which more or less directly operates upon and injures the goods; or that sea water should come in contact with part of the cargo; but it must come into actual contact with the articles for the damage to which the underwriters are sought to be charged."

The result of this ruling was that the underwriter was absolved from liability upon a state of facts curiously resembling, as the court remarks, those in the former case of *Baker v. The Manufacturers' Ins. Co.*, where the same tribunal had held the underwriters liable. The difference in result arose simply from the insertion of the warranty under consideration here. The case is directly in point and it is adverse to the claim of these libellants.

I have not overlooked the suggestion made in behalf of the libellants that a distinction between that case and this

Neidlinger *et al.* v. The Insurance Company of North America.

arises from the fact that there the wine was valued by the case in the policy, while here the policy is open. But this is a distinction without a difference. Inserting in the policy a valuation of the articles by the case does not change the nature of the contract. It is still a policy in gross upon a shipment consisting of different articles (*Hernandez v. The Sun Mutual Insurance Co.*, 6 Blatch. 317); and so far as the question under consideration is involved the two policies are alike.

The conclusion reached by the Supreme Court of Massachusetts commends itself to my judgment. It is certainly in harmony with the letter of the warranty, and as I think with the spirit and intention of the parties; and no arguments have been here presented sufficient to lead me to a different conclusion.

It has been said that the vapor arising from sea water is sea water within the meaning of the warranty. But the difference between a case where damage arises from sea water carried by absorption or capillary attraction, and one where the damage is caused by the vapor evolved from sea water, is palpable. The risk is different in the two cases, not only in degree but in character, because the vapor of water is communicated under different circumstances and in obedience to different laws from those that control the movements of water.

Nor can the position be maintained that the barley shipped by the libellants is to be deemed for the purpose of the insurance to be a single article, and, as in *Woodruff v. The Commercial Ins. Co.*, the insurer be held liable upon the ground that all the damage arose from sea water having been communicated by absorption or having made its way upon some other principle of natural philosophy from one part of the article to another part of the same article. For, however the fact may have appeared in *Woodruff*

~~THE~~

EASTERN DISTRICT OF NEW YORK,

~~IN SENATE CHAMBER~~ v. The Insurance Company of North America.

~~IN SENATE CHAMBER~~ *Commercial Ins. Co.*, in this case the evidence forbids the conclusion that sea water was ever communicated to any article except the 5,360 sacks that displayed marks of the contact with sea water. It is, therefore, impossible upon the evidence in this case to hold that the disputed damage was occasioned by the actual contact of sea water with a part of the article insured. Nor can a shipment of grain in bags be deemed to consist of a single article.

In a case of insurance upon hides before the Supreme Court of the United States (*Bias v. The Chesapeake Ins. Co.*, 1 Cranch. 416) the insurance was described as an "insurance in gross on a cargo consisting of a distinct number of articles." If such be the character of an insurance upon hides, certainly an insurance upon grain in sacks cannot be said to consist of a single article.

But it is said, if this be an insurance of many different articles in gross the different kernels of grain constitute the articles of which it is composed, and inasmuch as it would be absurd to suppose an intention by the warranty to compel the insurer to show actual contact of sea water with each kernel of grain, it must have been the intention to treat the barley as consisting of a single article when applying the provision of the warranty. If this were the intention no advantage would result to the libellants, for, as before stated, the damage in dispute did not result from the contact of sea water, but from the contact of vapor. Besides, policies of insurance are commercial contracts, to be construed and applied in view of the methods pursued by the merchants in their dealings with each other, and among merchants no notice is taken of the possibility that some of the kernels in a sack of grain that is wet may escape contact with the water; but in the absence of evidence to the contrary they act upon the assumption—sufficiently accurate for all practical pur-

Neidlinger *et al.* v. The Insurance Company of North America.

poses—that when sea water comes in contact with a sack of grain it will by absorption be brought in contact with all the grain in the sack. And in such case they would, when ascertaining the part damaged, treat each sack as constituting a single article. The more reasonable supposition, therefore, is, that it was the intention of the parties to this contract that in applying the warranty each sack of grain should be deemed a distinct article. So understood, the warranty will read: “This grain is warranted free from damage or injury from dampness, unless such dampness be caused by actual contact of sea water with the damp sack.” If the policy had contained a warranty so worded it would scarcely have been claimed that the insurer was liable for any damage outside of the 5,360 bags which showed marks of the actual contact of sea water.

My conclusion, therefore, is that the libellants have failed to show that a loss equal to 20 per cent of the value insured was occasioned by any peril insured against, and their libel must, therefore, be dismissed, with costs.

For libellants, *W. W. Goodrich.*

For respondents, *C. A. Hand.*

Southern District of New York.

FEBRUARY, 1879.

THE UNITED STATES *vs.* THOMAS F. YOUNGS ET AL.

EVIDENCE.—PRODUCTION OF BOOKS AND PAPERS BY THE UNITED STATES.

Although a bill of discovery will not lie against the United States, yet under U. S. Rev. Statutes, section 724, which is a re-enactment of the statute of 1789, Ch. 20, section 15, the United States will be compelled to produce the official weigher's returns of the weight of merchandise, on the motion of a defendant sued for a balance of duties alleged to be due thereon, the defence being that the duties are fully paid, and the motion being supported by affidavit that an inspection or copies of the returns is necessary to enable the defendant to prepare for trial:

The remedy given by the statute is not confined to production of books and writings upon the trial.

CHOATE, J. This is a suit to recover a balance of duties alleged to be due to the United States on certain sugars imported by the defendants. The answer alleges that the sugars were weighed by the government weighers and their true net weights so ascertained were duly entered in books of the government, and that the defendants have fully paid the duties on such weights. This is a motion to compel the production by the plaintiff of the official weighers' returns of the weights of the sugar, and the motion is supported by affidavits showing that an inspection or copies of these returns are necessary to enable defendants to prepare for trial.

The right to this discovery is claimed under U. S. Rev. Statutes section 724, and also under section 805 of the N. Y.

The United States v. Thomas F. Youngs et al.

Code. Rev. Statutes section 724, which is a re-enactment of section 15 of the Act of 1789, Ch. 20, provides that: "In the trial of actions at law the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default." In the case of *The Central Bank of Georgetown, etc., v. Tayloe*, 2 Cranch C. C. 427, it was held that the production of books and papers under this statute could be compelled before the trial, and to enable the party to prepare for trial as well as upon the trial. And in this circuit the practice has followed this construction of the Act (*Jacques v. Collins*, 2 Blatch. C. C. 23; *Funch v. Riddlemen*, *Id.* 301); although in the cases of *Iasigi v. Brown*, 1 Curt. C. C. 401, Mr. Justice Curtis held that the production of papers could only be compelled at the trial.

It is objected on the part of the plaintiff, that the books called for would not be in themselves evidence for the defendants, but the statute surely is not limited to those documents that prove themselves. As to most books and papers the production of which is compelled on motion or by bill of discovery, they are only admissible in evidence in connection with the testimony of a witness or witnesses. And in this case there is no doubt of the pertinency of these weighers' returns in connection with the testimony of witnesses who may be called. It is evident that an inspection or copies of

these documents are necessary to enable the defendants to prepare for trial.

It is further objected that the documents called for are not in the possession of the district attorney but in the custody of the collector of the port, an independent officer of the Government, holding them under statutes imposing this duty upon him. I cannot perceive that they are any the less "in the possession or power" of the United States on that account. The government here suing as plaintiff has many agents, like a corporation, but whatever is in the official custody of its agents is in its possession or power as truly within the meaning of this Act as the books of a corporation are within its possession or power, though lodged with particular officers whose duty as to the custody of such books may be defined or prescribed in the charter or by-laws of the corporation. There seems to be no reason for excepting the United States from the operation of this Act. It is not expressly excepted. The reasons for granting the relief apply with equal force to suits in which the Government is a party as to suits between private persons. The reference in the statute to proceedings in chancery, evidently meaning by bill of discovery, is not used as limiting or designating the parties against whom the power of the statute may be invoked. It appears merely to and is used to define the *cases and circumstances* under which the power will be exercised, that is to say, the evidence must be of that kind which can be compelled by a bill of discovery and the circumstances necessary to be shown upon a bill of discovery as to the relevancy of the evidence and the necessity for its production, etc., must be shown to compel its production on motion. The fact therefore that a bill of discovery would not lie against the United States is immaterial. The reason it would not lie is that the United States could not be sued as a defendant, a merely technical

The United States v. Thomas F. Youngs *et al.*

obstacle to discovery in that way. The remedy by motion is free from any such technicality. When the United States comes into court as a suitor it subjects itself, like any other suitor, to be proceeded against by motion in the cause, in any matter in which parties in the action have by statute or the practice of the court the right to relief by motion secured to them.

The statutes prescribing the duties of the collector in the safe keeping of custom house documents and the regulations of the treasury department made under the statute, authorizing the Secretary of the Treasury to prescribe rules for the government of the collector in that respect, have no relation to the production of these documents as evidence, either under *subpœna duces tecum* or on motion under this statute. There is nothing in the statutes of the United States withdrawing these documents from use as evidence in the courts of the United States, or even providing for the use of office copies of them in place of the originals, as is the case with papers in the Executive departments.

Motion granted.

For the motion, *Nash & Holt*.

For the United States, Assistant U. S. District Attorney
Tenney.

FEBRUARY, 1879.

THE UNITED STATES vs. BENJAMIN F. HUTTON
ET AL.

RIGHTS OF MERCHANTS.—CUSTOM HOUSE PAPERS.—POWER OF SECRETARY OF TREASURY TO MAKE REGULATIONS AS TO SAME.—DUTY AND POWER OF COLLECTOR IN RESPECT TO SAME.—MANDAMUS.—PRODUCTION OF PAPERS COMPELLED BY ORDER.—BY BILL OF DISCOVERY.—BY STAY OF PROCEEDINGS.—REMEDIES AGAINST THE UNITED STATES AS PLAINTIFF.

In a suit brought by the United States to recover duties, the defendants, on proof by affidavit of a demand by their counsel on the collector of the port, for an inspection of the invoices, entries, warehouse bonds, entries for withdrawal and permits, and the custom-house memoranda of payment of duties on the same or in the books of the custom-house in which payment of the duties should be noted, if the same were paid, and of the collector's refusal to exhibit the same, and also on proof by affidavit that they had entrusted the money to make the payments to one of their clerks and that their own books and papers do not furnish means of ascertaining the amount of the duties as liquidated, nor what payments, if any, were made at the custom-house, and that the collector supported his refusal by reference to a regulation of the treasury department, forbidding any person not connected with the custom-house to inspect or have access to or to take copies of any custom-house paper, except upon written application to the collector, stating his personal interest in the application and providing for a statement to be made on such application to be submitted to the collector and by him furnished to the applicant, if deemed consistent with the public interest and necessary to the rights of individuals (said regulation being made under U. S. R. S. § 251, which authorizes the secretary to make regulations to promote the public convenience and security and to protect the United States as well as individuals from fraud and loss, and regulations not inconsistent with law to be used under and in the enforcement of the laws relating to raising revenue from imports, etc.); and on further proof by affidavit that the defendants could not safely answer the complaint without an inspection of these papers, the defendants having moved for a mandamus against the collector requiring him to exhibit the same or for other relief :

The United States v. Benjamin F. Hutton *et al.*

Held, That any regulations made by the secretary under R. S. § 251 not inconsistent with law and fairly within its scope and purpose and not infringing upon any existing legal rights of individuals, have the force of law ;

That such of these custom-house papers as belong to the merchant when delivered to the collector, as, for instance, invoices, continue his property, though required by law to be impounded at the custom house, and that he has a legal right to inspect them and also other custom-house papers relating to his transactions with the custom-house in respect to his importations, under reasonable restrictions ;

That the regulation referred to, so far as it was calculated to preserve custom-house papers from improper and unauthorized inspection, and to provide a proper and orderly mode for the exercise of the right of access by the merchant having a special interest therein, is a reasonable regulation under R. S. § 251, and not inconsistent with law ;

That, if construed to deny all access to and inspection of said papers by the merchant specially interested therein, it would be inconsistent with law and so far would be void, but it seems that such is not its necessary or proper construction ;

That mandamus is a proper remedy to enforce such right of inspection if denied, but that the circuit and district courts of the United States have no original jurisdiction to issue the writ, but may issue the same in a pending suit under R. S. § 716, "if necessary for the exercise of their jurisdictions and agreeable to the usages and principles of law ;"

That under R. S. § 716, the writ could be issued, if in this cause under a lawful order of the court it should become the duty of the plaintiff to permit an inspection of the papers and the performance of that duty should be obstructed by the refusal of the collector to exhibit the same ;

That the remedy by mandamus, however, would not lie if the defendant has any other remedy to obtain the same relief ;

That the remedy generally open to a defendant to obtain inspection of books and papers is by bill of discovery, and after issue joined by order of the court on motion under R. S. § 724 ;

That, as this matter of the production of books and papers is expressly regulated by Act of Congress, it is not a matter in which by R. S. § 914 the practice of the State courts, which is broader and allows this relief before issue joined, is adopted ;

That the circumstance that the United States cannot be made defendant in a bill of discovery will not be allowed by the court to defeat a substantial right of the defendants which such bill of discovery would have secured to them.

Whether before issue joined and independently of statute the court could, on motion, compel the production of books and papers, *query*; but

Held, That, in this case, as on the undisputed facts the defendants have a right to the production of the papers called for, and a bill of discovery will not lie, the court can and should stay the plaintiff's proceedings in the suit till their production, and in case of the refusal of the collector to exhibit them within a certain time limited by the court, that a writ of mandamus issue for their production;

That the regulation above referred to does not make it unlawful for the collector to exhibit said papers under the order of the court nor to produce them in court under *subpoena* or at the request of the district attorney;

That the collector was justified in refusing to exhibit the same to the defendants' counsel, no order of the court having been made for their inspection or production.

CHOATE, J. In this case, which is a suit at law to recover duties on goods imported by the defendants, they move for a mandamus against the collector of the port to obtain the inspection of certain custom-house papers, or, if that motion is not granted, for a stay of the plaintiff's proceedings. The complaint alleges the importation and entry of the goods, the liquidation of the duties and their non-payment. Before answering and professedly for the purpose of enabling them to answer, the defendants' counsel applied to the collector of New York for an inspection of the papers in the Custom-House relating to these importations, especially the warehouse bonds, the entries for withdrawal and the permits, and the memoranda made on these papers or on other papers or books of the Custom-House which show, or in the ordinary course of custom-house business should show, any payments made on account of duties on these goods. The defendants' affidavits show that they entrusted to one of their own clerks the money necessary for paying all duties on these imported goods, and that their own books and papers do not furnish them with the means of information as to the amount of the duties as liquidated or as to what payments in

The United States v. Benjamin F. Hutton *et al.*

fact, if any, were made through this clerk at the custom house. The collector refused the inspection, and referred the defendants' counsel to a regulation of the treasury department which is as follows: "No person (not connected with the Custom-House or Treasury Department) is to be allowed access to or permission to inspect, examine, take copies of or have copies furnished of or be advised of the information contained in any record, document, paper, letter or account belonging to the Custom-House, except upon the following terms and conditions, viz: Upon application in writing to the collector, by any individual having a personal interest, setting forth the nature and object of the application and his interest therein, and specifying the particular information or data requested. Upon receipt of such application the collector will direct some suitable and competent person attached to the Custom-House to make the requisite examination of the record, paper, letter or account, as the case may be, and prepare a statement in writing of the information called for, to be submitted to the collector who may, should he deem it consistent with the public interest and necessary to the rights of individuals, furnish the same to the applicant; but if he entertains any doubt as to the propriety of furnishing it he will report the matter for the direction of the department. All persons attached to the Custom House are expressly forbidden from communicating, either orally or otherwise, any information contained in the records or files of the Custom House to any person not attached to the customs or revenue, except such as may be necessary to aid merchants and others in the regular daily routine of business passing through the custom house. And any clerk or other subordinate officer employed in the Custom House, who may furnish information to private individuals or shall accept or receive any fee, reward or compensation other than

The United States v. Benjamin F. Hutton *et al.*

that allowed by law, or shall accept any gratuity whatsoever for any services he may perform for any person which are not devolved upon him by law or regulations; any such clerk, subordinate officer or other person so offending will become subject to removal from office or employment and must be suspended from employment forthwith, and the collector, naval officer, appraisers or surveyor, as the case may be, is enjoined to report to the department the name of any person so offending for its directions." This regulation was made under section 251 of the Revised Statutes, which authorizes the secretary of the treasury "to make and issue from time to time such instructions and regulations to the several collectors, as he shall deem best calculated to promote the public convenience and security and to protect the United States as well as individuals from fraud and loss; he shall prescribe the forms of entries, oaths, bonds and other papers and rules and regulations not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal revenue laws, or in carrying out the provisions of law relating to raising revenue from imports or to duties on imports or to warehousing; he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law."

It is clear that any regulations made under this statute which are not inconsistent with law, and which are fairly within its scope and purpose, and which do not violate or infringe upon any existing legal rights of individuals, have the force of law. (*Aldridge v. Williams*, 3 How. 29.)

The argument for the defendants is that merchants, by reason of their special interest in the custom-house papers, which relate to their own importations, have a right to inspect and take copies of them; that especially, when sued by

The United States v. Benjamin F. Hutton *et al.*

the Government in respect to some obligation growing out of such importations, they have such right of access to these papers, when necessary to enable them to make their answer or prepare for their defence ; that this regulation does not apply to such a case nor take away this right ; that, if it is to be construed as doing so, it violates their legal rights, and so is not consistent with law ; that the enforcement of this right of access to the papers can be secured when denied, by the writ of mandamus, if no other remedy is given therefor, and that the laws of the United States afford no other remedy, the provisions of statute for the discovery of books and papers being inapplicable to suits in which the United States is a party, or, if applicable thereto, not extending to the compelling of a discovery of books and papers until after issue joined in the action ; and that this court has power to issue the writ of mandamus in an action of which it has jurisdiction where the issuing of such writ is necessary to the exercise of the jurisdiction and agreeable to the usages and principles of law, and that the issue of the writ in this case is necessary to the exercise of the jurisdiction and agreeable to the usages and principles of law.

The statutes defining the duties of collectors of customs do not specify his duties in respect to the custody or mode of preserving the papers that are required to be lodged in his office or the records made therein, nor the rights and privileges of other parties in respect thereto. (Rev. Stat. § 2621.) From the nature of the documents and the relation of the Government to the merchant to whose business these papers and records relate, and the necessity out of which such deposit of papers and the keeping of such records arise, the duties of the collector in regard to them, may, however, with certainty be deduced. Some of these papers are, notwithstanding their deposit in the Custom House, the

personal property of the merchant, as, for instance, invoices which he receives from his foreign correspondent and which constitute his proper and original paper title or assurance of title to the goods. While the public good undoubtedly requires that these invoices should be impounded at the Custom House, yet this necessity does not affect in the slightest degree the ownership of the paper. And I think it would require a positive statute most explicit in its terms to take away from the merchant the right to inspect and take a copy of his own invoice in the Custom House. As to other papers in the Custom House relating to his importations, such as entries, bonds, permits, etc., the right of access to them may not be based on a strictly proprietary right, and yet they are the written memorials and the only ones (for no duplicates are delivered to the merchant) of business transactions between him and the Government, which for safe keeping and for reasons of public policy are required to be kept in this public office. They appear to me to be public records in which the merchant has a special interest, which implies the right of access to them on his part, under reasonable restrictions as to their preservation and the proper and orderly conduct of the public business of the collector's office. Revenue laws should be construed, as far as is consistent with carrying into full effect their legitimate purposes and objects, so as to infringe as little as possible on existing private rights and to embarrass as little as possible merchants in the transaction of their business.

But besides the duty of preserving carefully these papers and records, subject to the existing rights of the merchant to whose business they relate, the collector is also, from the nature of the papers and of that public necessity which requires them to be kept at the Custom House, equally bound by his official duty to guard them against the prying or mis-

chievous curiosity of parties having no interest in them. These papers are not public records in the sense of being placed in a public office for the information of all the world. On the contrary, they are papers relating to the private business of the merchant, which a public necessity, connected with the collection of the public revenues alone, requires to be entrusted to and kept by the Government. Hence follows the duty of the Government to preserve as confidential the secrets of business thus disclosed to it, so far as is consistent with that public necessity which alone led to their disclosure.

The regulation of the Treasury Department above recited was evidently intended to provide for, and is, in some respects, well adapted to meet this two-fold duty of the collector in respect to the care of the papers in his office, viz.: To secure to the merchant reasonable access to them, and to guard them against the impertinent or mischievous curiosity of unauthorized persons. It is claimed by the defendants that it unduly restricts the merchant in his right, under reasonable conditions, to inspect and take copies of the papers. Construed literally, indeed, it prohibits all *inspection*, by any one not connected with the Government service, and permits only the delivery to the merchant of a statement of the contents of papers, or copies of them prepared by a subordinate in the Custom House. The right to *see* the papers themselves must often be quite as important to the merchant as the right to have such a statement or copies. Perhaps, however, the regulation, in view of the purposes intended to be subserved by it, may be construed so as to permit an actual inspection of the papers. If not, it seems in that respect to go beyond the authority conferred by the Act of Congress, and to be inconsistent with law, because it infringes upon existing legal rights. That the regulation,

though strict, is entirely proper and legal in requiring a written application for access to or information concerning the papers, and in directing that the application should be made to the collector himself, and in forbidding under penalty of dismissal any subordinate to give such information, is evident enough. These regulations are not only reasonable, but in the interest of the merchants themselves, as guarding the secrets of their business against unwarranted intrusion.

That the writ of *mandamus* is an appropriate remedy to enforce any right of inspection of Custom-House papers, which a merchant has, and which the collector may deny, cannot admit of question ; but the District and Circuit Courts of the United States are not authorized by law to issue the writ of mandamus as an original writ. These courts are, therefore, powerless to give this relief for violation of this right of inspection, so far as it is simply the right of the merchant based upon a right of property or special interest in the papers. These courts, however, are expressly authorized "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." (Rev. Stat. § 716.) The question whether this statute includes the writ of mandamus, is settled by the authority of the Supreme Court, which has held the writ properly issued under this statute to commissioners of a county to compel the levy of a tax which was necessary for carrying into effect a lawful decree of the Circuit Court. (*Com. of Knox Co. v. Aspenwall*, 24 How. 383.) And this case is conclusive authority that a mandamus against the collector is the appropriate remedy, in case, under a lawful decree or order of this court in this cause, it should become the duty of the United States to permit an inspection of these papers, and the performance of that duty should be

obstructed or prevented by the refusal of the collector to permit the same.

The writ of mandamus, however, does not issue if the party has another remedy to obtain the same relief.

However clear might be the absolute right of the defendants to inspect these papers, that absolute right would not avail them in this proceeding. Their right to relief here must rest on their rights as parties in the cause according to the usage and practice of the court, and the statutes, if any, regulating the subject matter. That the defendants have become involved in a lawsuit with the Government, in relation to the duties to which these papers relate, cannot take away nor abridge any such absolute right. On the other hand, the necessity or convenience to them of the exercise of the right, if it exists, makes the denial of any such right, if it has been denied, a more flagrant act of injustice than it otherwise would have been. But by reason of the want of power to issue a writ of mandamus, except as is necessary to the exercise of jurisdiction, the court is powerless to enforce any such right otherwise than as it shall be necessary to the exercise of its jurisdiction, and unless according to the principles and usages of law the defendants can require it as parties to this action.

We are brought, therefore, to the question, What rights, if any, have the defendants, as defendants in this suit, to the inspection of these papers, and if any such right exists, how is it to be availed of and enforced? I think the defendants show that they cannot safely or properly answer the complaint of the Government without an inspection of these papers. The right of one party in a suit to demand an inspection or copies of books and papers in the possession of the other, either for the purpose of preparing a pleading or of preparing for trial, has long been recognized as a right

which the courts should, in some form and under proper circumstances, enforce. Independently of statutory provisions, the right has generally been enforced by bringing a bill of discovery in chancery for the purpose. But to avoid the delay and expense of such a proceeding, statutes have been passed, both State and Federal, substituting, for the bill of discovery, a proceeding in the action itself, by way of motion and order. The production of books and papers is, so far as the Federal courts are concerned, regulated by Rev. Stat. § 724, as follows: "In the trial of actions at law the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant, as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default." In the recent case of *United States v. Youngs* (ante p. 264) it has been held that a motion for the production of books and papers may be made under this statute against the United States where it is the plaintiff. And in case such an order is made and not complied with, a mandamus in the suit will lie against the collector, or the court may non-suit the plaintiff. But this statute seems clearly to limit the remedy to cases in which issue is joined, one test of the statute to the right to a production of the books and papers being that they contain evidence "*pertinent to the issue.*" I do not think, however, that this statute is to be construed as taking away any right to have relief by bill of discovery, except in cases where the new remedy, by motion, is given. The relief by bill of discovery covered

The United States v. Benjamin F. Hutton *et al.*

many matters not provided for by this section, and bills of discovery are not abolished by it. (*Beardsley v. Littell*, 14 Blatch. 105.) The object of the statute was to give a more summary remedy in certain cases, not to take away any existing remedies. A bill of discovery would lie to obtain the production of books and papers to enable a party to draw his pleading, and I see no reason why that remedy should not now be open to the defendants, if it were possible for them to make the United States respondent in such a bill. This is a merely technical objection, and one which a court of equity certainly would not allow to defeat the substantial right of a party to a discovery. In the case of *The United States v. Wagner*, L. R. 2 Ch. 582, an objection was made to a bill, brought by the United States to recover property formerly in possession of the so-called Confederate States, that some officer should be joined on whom as a co-defendant service could be made in case a cross-bill for discovery should be filed; but the judges were all of opinion that the objection that such person was not joined in the bill, was not well taken, and that the fact that a bill of discovery would not be effectual against the plaintiff as sole defendant, would not defeat the defendant's right to a discovery, since the court could and should stay all proceedings, unless the plaintiff should name some person against whom the bill of discovery might be effectually brought. Lord Chelmsford says, p. 590: "If the defendant wishes to obtain a discovery, and files a cross-bill for the purpose, he may apply to the United States to name some person from whom the authority sought for may be obtained, and if they refuse to furnish him with this information the court will be justified in staying the proceedings in the suit until the defendant's demands are complied with." And Lord Cairns says, p. 595: "I apprehend that the only rule is that the person, state or corpora-

tion which has the interest must be the plaintiff, and the court will do the best the law admits of to secure to the defendant such defensive discovery and relief as he may be entitled to. The court can in all cases suspend relief on the original bill until justice is in this respect done to the defendant." A court of law, as well as a court of equity, can stay proceedings in a suit, to prevent injustice, and this case is a sufficient authority for staying a suit, if the defendant cannot get a discovery of books and papers, which by the usages and principles of law he is entitled to, by reason of technical difficulties in obtaining a discovery by bill against the plaintiff.

Rev. Stat. § 724 gives no remedy by motion and order until after issue joined. I think it excludes such relief before issue joined under the Code of New York, because, where the statutes of the United States have expressly provided the mode of practice, there the State practice is not adopted by section 914 of the Revised Statutes. (*Beardsley v. Littell*, 14 Blatch. 102.) The defendants' right to compel the production of papers by motion independently of statute, especially before issue joined, must be considered doubtful, although there is some authority for it.

In England the practice seems to have been adopted by the common law courts of compelling the production, on motion, of papers which could be obtained by bill of discovery (Graham's Practice, 524, and cases cited), and in some cases in this country, such relief was given on motion. (*Bronson v. Kensey*, 3 McLean 180; *Wallis v. Murray*, 4 Cowen 401 and cases cited.) But in New York, at any rate, the proceeding by bill of discovery was held, except in some early cases, the proper course until the matter was regulated by statute. (Graham's Practice *ut supra*. And see *Birdsall v. Pixley*, 4 Wend. 196.)

The United States *v.* Benjamin F. Hutton *et al.*

But what necessity is there in the present case for a bill of discovery, even if that is the appropriate remedy? All the material facts which it would be the office of such a suit to ascertain are admitted. The existence of the papers; that they are in the custody of the collector; that they relate to the goods in respect to the importation of which this action is brought; that they show the liquidation of the duties—all these facts are admitted. The only fact denied is that there is any record of the payment of these duties. It is alleged in the moving affidavits and not denied that in the course of the business of the Custom House a memorandum of payment of duties is made on the warehouse bonds and other papers called for. Enough appears, therefore, which is not denied, to entitle the defendants to an inspection of these papers before they answer. I think, therefore, that a stay may be properly granted until the plaintiff shall permit an inspection of these papers, and that the defendants should be allowed twenty days after such inspection to file their answer.

The objection that the regulation of the Treasury Department makes it unlawful for the collector to exhibit these papers has no force. That regulation was not designed to provide for, nor to prevent or embarrass, or indeed in any way to relate to the production of custom-house papers as evidence in courts of justice. Its purpose is apparent on its face. It simply regulates their production or information respecting them to be furnished, on application of private persons claiming the right of inspection or information by reason of their special interest in the papers. It is matter of every day practice in this court for these papers to be produced on subpoena, both in suits brought by the United States and in suits between private parties. And the duty to produce them upon the order of the court for purposes of evidence or discovery is equally imperative, and not in any

UNITED STATES DISTRICT OF NEW YORK,

United States v. Benjamin F. Hutton *et al.*

... intended to be affected by this regulation. The duty of the collector of the customs is that of the United States attorney in the prosecution of all cases and for frauds upon the revenue, and there is no question that it is his duty upon the request of the attorney to produce in court any papers in the Custom House required for the proper prosecution of such suits. This is clearly his duty as it is to produce them upon the subpoena of another party; and his constant practice in this respect shows that the practical interpretation put upon this regulation has not prevented the unembarrassed production of these papers in court for the purposes of justice. If, therefore, this action is stayed for want of the production of these papers it will, I conceive, be the official duty of the collector, in order that he may give that assistance which is due from him for the proper and diligent prosecution of the action, to furnish these papers to the district attorney or himself to exhibit them to the defendants.

As to the claim of the defendants that the collector should have complied with the demand of their counsel to see these papers, I am of opinion that, considering the claim as made on their behalf as defendants in this suit, the collector was not under any obligation to comply with it. It is for the court and not for the parties to determine whether justice requires an inspection or the production of papers, and until there is an order of the court giving such a right of inspection, or, as in this case, granting relief by a stay of the proceedings of the United States because of their non-production, which equally imposes on the collector the duty of exhibiting the papers, he is justified in refusing all applications for them by counsel for use in a suit, which do not conform to the regulations of the Treasury Department.

The United States *v.* Benjamin F. Hutton *et al.*

A stay of the plaintiff's proceedings is not a complete remedy. It may operate as a perpetual bar to the determination of the cause. If within a reasonable time such stay shall not have the effect of obtaining the discovery the defendants desire, I see no good reason why a mandamus should not issue against the collector. That is necessary to the exercise of the jurisdiction which is necessary to carry into effect the lawful orders of the court. And any attempted distinction between the issue of the writ against a ministerial officer not a party to the cause, to compel the performance of a duty made imperative by the decree of the court and necessary for the execution of that decree, and the issue of the writ to such an officer to compel the performance of a duty made imperative on him by the order of the court, and the performance of which is necessary to the progress of the cause, and the rendering of any judgment, would be too nice. Either case is within the terms of Rev. Stat., § 716.

Let orders be entered denying the motion for a mandamus, and staying all proceedings of the plaintiff in the action, until twenty days after the papers described in the petition have been exhibited to the defendants' attorneys. And in case such papers shall not be exhibited within ten days after the entry and service of this order, let an alternative mandamus in this cause issue to the collector, requiring him to exhibit said papers or show before this court on the next motion-day thereafter why a peremptory writ of mandamus should not issue.

For defendants, *R. M. Sherman* and *John N. Whiting*.

For the United States, District Attorney *S. L. Woodford* and Assistant District Attorney *J. D. Jones*.

FEBRUARY, 1879.

THE UNITED STATES vs. FREDERICK D.
TAPPAN ET AL.

SUCCESSION TAX.—PERSON LIABLE.—BENEFICIARIES.—TRUSTEES.

The person liable to pay a tax on a "succession" under sections 126 to 137 of the Act of June 30th, 1864 (13 Stat. at Large, p. 287), is the person beneficially interested in the property, and not the trustee or executor in whom the legal title is vested, or to whom a power in trust is given for the benefit of such person.

CHOATE, J. This is an action brought to recover succession taxes. The defendants demur to the complaint on the ground that it states no cause of action. The complaint alleges that Ann Eliza Cairns died March 18th, 1866, having made her will, appointing the defendants her executors; that by her will she devised all her real estate at Roslyn, in Queens county, New York, to her three grandchildren in fee, and empowered and directed the defendants as her executors to lease the real estate and receive the rents and profits and apply the same in divers ways in the will specified, until the eldest of the grandchildren should attain the age of twenty-one years or marry, whichever event should first happen; that by said will the defendants became entitled in possession to said real estate on behalf of the devisees thereof, none of said devisees being of the age of twenty-one years or married, and that the defendants entered upon the real estate and leased it and received the rents and profits, and applied the same as directed by the will; that the value of the real estate was \$25,000, and that the tax or duty of one per cent thereby became due from defendants. For a

The United States v. Frederick D. Tappan *et al.*

second cause of action the complaint alleges that the testatrix gave and devised to her three grandchildren real estate in the city of New York, for the term of their natural lives; that by the will the defendants, as executors, were empowered and directed to let or lease the same and receive the rents and profits, and apply the same in divers ways by the will directed; that thereby the defendants became entitled in possession to this real estate on behalf of said devisees: that they entered upon and leased it, and received the rents and profits, and applied them as directed by the will, and are still in possession thereof and still continue so to receive and apply the rents and profits; that each of said devisees, the grandchildren, succeeded to a life estate in one-third of the rents and profits of the same, the values of said life estates amounting in all to \$373,108, and that the defendants became liable to pay the succession tax thereon at the rate of one per cent, amounting to \$3,731.08.

It is insisted on the part of the defendants that on these facts stated in the complaint the devisees, and not the executors, are the parties liable, under the statute, to pay the succession tax. The provisions of law in relation to taxes on successions to real estate are contained in sections 126 to 150 of the Act of June 30th, 1864, (13 St. at Large pp. 287—291.) By § 126 a “*succession*” is defined as denoting “*the devolution of title to any real estate.*” By § 127 it is declared “*that every past or future disposition of real estate by will, deed or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate or the income thereof upon the death of any person dying after the passing of this Act, shall be deemed to confer on the person entitled by reason of any such disposition a succession;*” and the term “*successor*” shall denote “*the person so entitled.*” By § 129 it is provided “*that where any persons*

The United States v. Frederick D. Tappan *et al.*

shall take any succession jointly they shall pay the duty chargeable thereon by this Act in proportion to their respective interests in the succession." Section 133 provides for the rate of the tax, varying with the relationship of the successor to the person from whom the succession is derived from one per cent in case he is the lineal issue to six per cent in case he is a stranger to the blood. This section says: "*There shall be levied and paid to the United States in respect of every such succession, the following duties.*" It does not expressly declare who shall pay the duty. Section 134, which is designed to meet the case of a succession passing from one person to another before it comes into possession, declares that one duty only shall be paid "*and shall be due from the successor who shall first become entitled in possession,*" and also that such duty "*shall be at the highest rate which, if every such successor had been subject to duty, would have been payable by any one of them.*" Section 137 provides that "*the duty shall be paid at the time when the successor or any person in his right or on his behalf shall become entitled to his succession or to the receipt of the income or profits thereof, etc.*" Sections 138 and 139 declare that the conversion of real estate into money, or money into real estate under any trust created therefor, shall be deemed a succession chargeable with duty under the Act; that the duty shall be paid "*by the trustee, executor or other person having control of the funds.*" Section 140 entitles a successor to a return in certain cases "*of a proportionate amount of the duty paid by him.*" So § 141 provides that in a certain case "*the successor shall be entitled to a return of so much of the duty paid by him as will reduce the same to the amount which would have been payable by him, if such duty had been assessed in respect of the actual duration or extent of his interest, provided that if the estate of the successor shall be*

The United States v. Frederick D. Tappan *et al.*

defeated in whole or in part by its application to the payment of the debts of the predecessor, *the executor, administrator or trustee so applying it shall pay out of the proceeds of the sale thereof the amount so refunded*, and provided also that if the estate of the successor shall be defeated in whole or in part, by any person claiming title from and under the predecessor, such person shall be chargeable with the amount of duty so refunded," etc. These sections clearly imply, if they do not expressly provide, that except in the cases provided for in sections 138, 139 and 140, in all of which a conversion of a fund of money into land or of land into a fund of money, and the possession of such fund by an executor or trustee, are contemplated, the successor himself is the party chargeable with and who is expected to pay the duty. The same inference may be drawn from expressions used in sections 142, 143 and 144. Section 147 provides "*that any person liable to pay duty in respect to any succession shall give notice to the assessor of his liability to such duty*," with an account thereof and statement of various details. Section 148 declares penalties for neglect to give such notice, and provides "that if any person liable under this Act to pay any tax in respect of his succession shall, after such duty shall have been finally ascertained, wilfully neglect to do so within ten days after being notified, he shall be liable to pay, etc." Section 149 gives an appeal to "*any party liable to pay duty in respect to his succession, who shall be dissatisfied with the assessment*," etc.

It is clear from all these provisions *that the "successor" is the party beneficially interested in real estate* the title of which is devolved in the requisite manner. There is nothing whatever, not a single expression in the Act, going to show that an executor or trustee, holding the title for such person so beneficially interested, or empowered to collect the

rents and profits for the benefit of such person, is to be regarded as the "successor" or treated as such, except in the particular cases above referred to, where a fund of money in the hands of an executor or trustee is expressly made the subject of the tax. It is urged by the counsel for the United States that the notice and statement required by section 147 cannot be supposed to have been intended to be made by an infant or person *non compos mentis*; that a fair construction of that section in view of its being intended that the notice and statement should be effectual, requires that it should be made by a trustee, if there be one, and so that it must be presumed that the person controlling the income was intended to be the person who should pay the tax properly payable out of it. But however convenient and suitable such an arrangement would be, it is enough to say that there is nothing in the Act to warrant such a construction. On the contrary, the expressions indicating the contrary purpose are too numerous and too clear to have been used inadvertently. If section 147 does not provide for the notice and statement being made for a successor who is under a disability, it is simply an imperfection in the law as a system of taxation. And in this connection it is to be observed that the Government did not rely solely on a personal liability for securing the payment of the succession duty, but also upon a lien upon the property, which continued five years. And if it was the duty of the trustee of a successor under disability to discharge such lien out of the rents and profits in his hands, the obligation was one which he owed to his *cestui que trust* only, and created no personal liability to the United States. Nor do the provisions of the same statute respecting the legacy tax, (sections 124 and 125), aid the construction claimed by the United States. On the contrary, those sections so carefully provide for an accounting for and payment

The United States *v.* Frederick D. Tappan *et al.*

of the tax by executors and trustees, that the very absence of any similar provisions in the sections which follow, and which regulate the succession tax, strongly support the defendants' claim as to the true construction of those sections.

Upon a consideration of the whole statute, it is, I think, free from doubt that the tax is payable by the successor himself, and not by his trustee, if he have one. In the present case it is claimed that under the statute law of New York these executors took no title as trustees, but only powers in trust. But the revenue laws of the United States were not drawn with any reference to nice distinctions in the State laws of this character, and it can hardly be claimed that if the intent of the statute was to make a trustee liable for the tax, he would be chargeable in one State where, by the local law, he was held to take a title in trust, and not chargeable under the same will in another State by whose local law he was held to be vested merely with a power in trust. The defendants' demurrer is sustained independently of any such distinction.

Judgment for defendants on demurrer.

For defendants, *Davies, Work & McNamee.*

For the United States, Assistant District Attorney *E. B. Hill.*

Gallagher *et al.* v. Murray *et al.*Condon v. The same.

FEBRUARY, 1879.

MICHAEL GALLAGHER ET AL. VS. D. COLDEN MURRAY ET AL.

MICHAEL CONDON VS. THE SAME.

SEAMEN'S WAGES.—CONDEMNATION OF VESSEL.—EXTRA WAGES FOR DELAY IN PAYMENT.

A steamer left New York on a voyage to Nassau, N. P., thence to Cuba and back to New York. Just before reaching Nassau she struck a rock and was so injured that, after she reached Nassau, a survey was called on the application of her master, and the surveyors recommended that she be condemned as unseaworthy, and thereafter the owners abandoned her to the underwriters. After the survey the master discharged the crew and offered them a passage to New York. Seventeen of them accepted the offer and came home to New York. The other eight refused the offer, claiming that the ship could be brought home; and they remained at Nassau for more than a month, during which time the master allowed them to sleep on board and he provided food for them. On the arrival of the seventeen at New York they claimed to be paid wages up to the time of their arrival besides three months' extra pay. The owners of the steamer refused to pay wages after the day when she was injured. The other eight, after their return to New York, made a similar claim, and suits were brought against the owners to recover the wages:

Held, That, by the proceedings taken as to the vessel, she was "condemned" as mentioned in section 4582 of the United States Rev. Stat. and the sailors therefore were not entitled to the three months' extra pay;

That the sailors were entitled to be paid up to the time of their discharge by the master in Nassau, and no later;

That the seventeen were entitled to the ten days' extra pay provided by section 4529, because there was no sufficient cause for the delay in payment;

That the act of the master at Nassau, in allowing them to sleep on board, and furnishing food for them after their discharge, did not entitle them to claim wages after such discharge.

Gallagher *et al.* v. Murray *et al.*Condon v. The same.

CHOATE, J. These are suits *in personam* for seamen's wages, brought against the defendants, the owners of the steamship Cleopatra.

The Cleopatra left New York October 17, 1878, bound on a voyage to Nassau, N. P., and thence to a port or ports in Cuba and thence back to New York. Just before reaching Nassau she struck upon a rock and was injured, and most of her cargo and passengers were forwarded by other vessels. She then proceeded to the port of Nassau, where she has ever since remained. The accident happened on the 23d of October, and she got into port about seven days later. The crew were kept by the ship till December 11th, discharging their ordinary duties, such as there were for them to do in port. Meanwhile a survey was called on the application of the master. It was composed of the captain of the port and the agent of American underwriters, and they called in to their assistance an engineer and a ship carpenter. They made a written report to the effect that one of the boilers was thrown out of place, the keel was injured, bolts started, and that the vessel was badly hogged, and unseaworthy; and recommended that, in consequence of her machinery being thoroughly disabled and of there being no facilities for repairing her there, she be condemned. Afterwards, on December 18th, the owners in New York wrote a letter of abandonment to the underwriters. The evidence now produced sustains the case found by the survey, and shows that she had suffered such injuries by reason of sea perils that she was wholly unfit to continue her voyage, and that she could not be repaired so as to complete her voyage. On the 11th of December the master, by direction of the owners, called the crew together, and informed them that they were discharged, and offered them a passage home to New York in another steamer of the same owners. Seventeen of them, being the

libellants in the first of these suits, accepted the offer and came home in the other steamer. The other eight refused to come home; took the ground that the ship could continue the voyage or be brought home, and remained at Nassau till about the 25th of January. The master permitted them to sleep on board and he provided board for them at Nassau. The libellants in the first suit now demand wages up to the time of their arrival at New York on the 11th of December, with three months' extra pay, on the ground that they were discharged at Nassau with their consent, and that the vessel was neither wrecked, stranded nor condemned as unfit for service. They rely on Rev. Stat. § 4582, which provides that the three months' extra wages due to seamen so discharged, shall not be required "where vessels are wrecked or stranded or condemned as unfit for service," but shall in no other case be remitted. It is claimed that "condemned" here means condemned by decree of an admiralty court. But considering the purpose of the statute, I cannot think the word was used in this restricted sense. Wreck, stranding or other fatal disability to the ship is recognized as discharging the contract between the ship and the seamen; but for the security of the seamen against possible imposition, it is required that where the case is not one of self-evident wreck or stranding, the proof of disability shall be shown by the condemnation of the vessel as unfit for service. The reference here is to that proceeding known in all ports, by which ships which have suffered disaster are condemned or pronounced unfit for service, the common method being by the report of a survey called by the consul of the nation to which the ship belongs, upon the application of the master. To give the words the restricted sense contended for by the libellants, would, in many ports and places, make performance of the condition impossible. In this case there was such a con-

Gallagher *et al.* v. Murray *et al.*Condon v. The same.

demnation, and the claim for three months' extra pay is disallowed. As the master kept the crew on duty till December 11th, they are clearly entitled to their wages till that time. (*Tarlton v. Mallory*, ante, p. 46.) These seamen further claim that their wages should be paid up to the time of their arrival in New York. For this claim there seems to be authority in the case of *The Elizabeth*, 2 Dodson 411. But I think this is a case where the service of the seamen was terminated by reason of the wreck or loss of the vessel, within the meaning of Rev. Stat. § 4526, and therefore they cannot claim their wages after the day of their discharge, December 11th. When the seamen were informed that their services would not further be required, they were told that they would be paid in New York on their arrival. When they arrived a dispute arose as to the amount due, the owners claiming that the wages were due only up to the 23d of October, and the seamen insisting on being paid up to the time of their return. Rev. Stat. § 4529, imposes on the owner a penalty of two days' extra pay for every day not exceeding ten during which the payment of wages is delayed beyond the period when by law it is payable, provided the delay be without sufficient cause. I cannot think that there was sufficient cause in this case for the delay in payment. The only question which could be looked upon as doubtful was whether the wages should cease on the 11th of December or on the 17th, and if this had been the only difference it may well be supposed that it could have easily been adjusted. But the owners having made a wholly unreasonable claim, and thereby kept the crew waiting for their wages, I think they are chargeable with the twenty days' extra pay.

As to the seamen who stayed in Nassau, nothing which the captain did in sheltering and feeding them can be construed as a revocation of the discharge, as is claimed by the

The Ship Shand.

libellants. It was an act of humanity, for which the ship owner should not suffer. As these men refused the discharge and the offer of return to New York and put the master and the owners to unnecessary expense, there is no reason why their wages should be paid beyond the 11th of December, when they were discharged in consequence of the voyage being hopelessly broken up.

Decree for libellants with costs and reference to compute the amount.

For libellants, *H. Heath*.

For respondents, *J. Sherwood*.

FEBRUARY, 1879.

THE SHIP SHAND.

DAMAGE TO CARGO.—PERIL OF THE SEA.—NEGLIGENCE.—BURDEN OF PROOF.—DUTY OF MASTER.

A ship took on board at Manila a large quantity of mats of sugar, to be brought to New York, under bills of lading containing the usual exception of perils of the sea. On the voyage she met with heavy weather and sprung a leak so that, after having jettisoned a part of her cargo, she arrived at her dock with ten feet of water in her hold, her crew having become so worn out by labor that after she had passed quarantine a gang of fresh men was sent to her, who were, however, able to control the leak with the ship's pumps. The consignees of the ship at once agreed with the owner of a steam pump and the pump was put on board the ship, and by the next morning the water in the ship had been pumped down as far as

The Ship Shand.

the suction pipe of the steam pump reached, which was just about at the bottom of the sugar. During the following day, the pump, which was in charge of an engineer and fireman employed by its owner, was worked at intervals as the water rose high enough to reach the suction pipe. The discharge of the cargo had been commenced and continued during that day. During the following night, none of the ship's officers or crew being on duty, the steam pump stopped working, and the water again flooded the lower hold where the sugar was stowed. The consignees of the sugar filed a libel against the ship, claiming to recover damages for a failure to deliver the sugar in like good order as when received, as she had contracted in the bills of lading to do; and the owners of the ship set up as a defence that the damage was occasioned by peril of the sea:

Held, That, the leak being shown to have been a peril of the sea, the ship had made out her defence as to the cargo jettisoned, and as to the sugar washed out by the leak and the injury caused by the leak to that which remained, up till the time when the water was first pumped out of the ship by the steam pump;

That the duty of the ship, on arriving at the dock, was to use whatever extraordinary means were accessible to prevent further injury to the cargo; and that the employment of the steam pump was an act of the master, in performance of that duty, and not an act of the master as agent of the cargo in extraordinary peril;

That the persons working the steam pump were therefore the agents of the ship and not agents of the owners of the cargo;

That the ship, therefore, was responsible for the proper performance of duty by those in charge of the steam pump;

That, although the original leak was a peril of the sea, the owners of the cargo, having shown that the leak could have been controlled by the use of means which were available, and that such leak had not been controlled, had made out a case of negligence on the part of the ship;

That the ship, having failed to give any explanation of the stoppage of the steam pump on the night in question, was liable to the owners of the cargo for all the loss and damage to the cargo which arose from the flooding of the ship on that night;

That the ship was liable for all the loss of sugar occasioned by the suction pipe being so short that the water must rise on the cargo in order to be within reach of the pump.

CHOATE, J. This is a libel by The Donner & De Castro Sugar Refining Company, the owners of part of the cargo of

The Ship Shand.

the ship Shand, against the ship and her owners, to recover damages on account of her failure to deliver her cargo in good order and condition, pursuant to the stipulations of her bills of lading. She shipped at Manila, among other goods, 34,742 mats of sugar, weighing about 2,430,940 pounds, and sailed from that port for New York on the 1st day of August, 1876. The sugar was stowed in the lower hold and properly stowed, and dunnaged. It was shipped under bills of lading which acknowledged its receipt in good order and condition, and stipulated for its delivery in New York in like good order and condition, "all and every the dangers and accidents of the seas and navigation of whatsoever kind excepted." The ship delivered in New York only 31,663 mats weighing about 1,008,865 pounds. As to the 3,079 mats not delivered it appeared that they were jettisoned at sea; and the loss of weight in the mats that were delivered was about 1,206,545 pounds. And for this failure to deliver and this loss of weight the suit is brought. The libel charges "that the said ship and her owners have failed to keep and perform the contracts in said bills of lading contained or to deliver the said sugars in conformity therewith; but on the contrary, by reason of carelessness and negligence on the part of said ship and her owners, and their servants or agents, a large part of said sugars were totally lost and a large portion of the remainder delivered in a damaged condition." The answer alleges that part of the sugar was necessarily jettisoned to save the ship and cargo and the lives of those on board, and that all the sugar which was lost or destroyed or jettisoned or which was not delivered was lost, destroyed or not delivered solely from the causes excepted in the bills of lading, and not from any fault, negligence or carelessness on the part of the ship and her owners, or their servants or agents. The answer further al-

The Ship Shand.

leges in excuse of the damage to the cargo that the ship sprung a leak on the voyage, by reason of violent storms and stress of weather, and that the damage was the result of this leak.

The proofs are sufficient to show that when the ship left Manila she was tight, staunch and strong. It is true that no evidence is given of any survey or examination made before her sailing, nor of any survey or examination of her hull after her discharge in New York to account for or to show the nature and position of the leak which she undoubtedly had in her upon her arrival; but the uncontradicted testimony of her master and mate as to her condition, and the fact that she was several months at sea and encountered considerable rough weather before a leak of any importance appeared, and that the leak did appear only after she met with very tempestuous weather, sufficient to account for the injury to a good ship, are clearly proof enough that she was seaworthy at the time of her sailing. The proofs also are sufficient to show that the circumstances of danger under which part of the cargo was jettisoned were such as justified the act, and that it was done under reasonable apprehension on the part of the master that the ship might founder, and for the purpose of checking the leak and for the safety of all concerned. As to that part of the loss, therefore, the defence is clearly made out and the libellants have no claim.

From the time the ship was off Cape Hatteras she encountered very heavy weather and the crew were kept constantly at the pumps, and even after the jettison of part of the cargo the leak continued. On the night of the 25th of December, 1876, she took the pilot, being then about sixty miles S. S. E. of Sandy Hook. She came to anchor at quarantine about midnight of the 26th. Her crew were exhausted with constant working at the pumps. The captain and the

The Ship Shand.

pilot had thought it necessary to call to their assistance two tugs to bring her in, and they had done so. From quarantine the master telegraphed to the consignees of the ship, Grinnell, Minturn & Co., of New York, for a fresh gang of men to work the pumps. At 5 o'clock in the morning of the 27th and again at 8½ o'clock, the pumps were sounded. At the first sounding they found nearly nine feet of water, and at the second sounding within an inch of ten feet. The depth of the hold from the platform on which the sugar was stowed, to the deck beams, was eleven feet and seven inches, and from the bottom to the platform, three feet and four inches. The ship left quarantine about noon on the 27th, and soon after leaving, took on board a fresh gang of men to work the pumps, and from the time they arrived they were able to control the leak with the ship's pumps. She arrived at Martin's stores shortly after noon of the 27th of December, with ten feet of water in her hold. There is considerable conflict of testimony as to the amount of water in the ship before her arrival at quarantine. The pilot, testifying from his recollection as to the behavior of the ship, and from his apprehensions lest she should founder, and also from his recollection as to the reports of the soundings, makes the depth of water eleven feet on the afternoon of the 26th, and six feet at five in the morning of that day; but he is evidently mistaken as to the amount, as appears by the log and the testimony of the master and mate. The captain testified to the correctness of the entry in his log, which shows that on Wednesday, the 27th of December, they sounded and found six feet four inches. He says this was very early in the morning and that there was no time before that when they had so much water in her as that. The evidence shows that the water had been gaining in consequence of the exhaustion of the crew, till it reached a maxi-

The Ship Shand.

mum of about ten feet, and that the leak was such that fresh men at the ship's pumps were able to hold it in check.

That a very considerable damage to the cargo of sugar had been done by sea water at the time of the ship's arrival at the pier is very evident. A large part of the sugar had been submerged in the water for nearly twenty-four hours, and this must have resulted in great wastage of the sugar. It is claimed by the libellants that the evidence does not warrant the conclusion that before Wednesday the water ever rose higher than the bottom of the cargo. But even that quantity of water, with the ship rolling and tossing in a heavy sea, must have very seriously wet and washed the sugar in the lower part of the ship. As soon as possible after her arrival at the pier, the consignees of the ship, upon the master's report and application for aid, engaged the Coast Wrecking Co. to send a steam pump, with sufficient men to work it, to the ship. This was done, and about eight or nine in the evening, the steam pump was got to work and worked continuously till three o'clock the next morning, when the pump sucked, having reduced the water to three feet and four inches, which was as low as its suction pipe reached. After the steam pump was got working the ship's pumps were stopped.

For all the loss and damage to the cargo by the salt water up to the time that the ship was thus pumped out by the steam pump, the libellants have no claim against the ship and her owners. The cause of the injury was a peril of the sea, and upon the most rigorous rule of diligence which has ever been enforced against the ship or the master in the effort to resist and overcome the effect of the threatened danger, this ship and her master and crew had up to that time discharged their entire duty to the cargo. They had

The Ship Shand.

used their utmost endeavors to protect the cargo from the threatened peril.

The discharge of the cargo was commenced on Wednesday. Manila hemp and indigo and canes from between decks, shipped to other parties, were first discharged. The stevedores worked all Wednesday night. On Thursday the steam pump was kept going at intervals, pumping till it sucked and then pumping again as the water rose. On Thursday a considerable quantity of sugar was discharged. They worked till five or six o'clock in the evening. A special permit had been obtained from the Custom House, allowing the discharge of this cargo more rapidly than is usual on account of its condition. The Custom House interposed no restriction whatever on the rapidity of the discharge or its continuing day and night, week days and Sundays. When the men quit work on Thursday evening, there were on board, of the ship's company, the captain, the mate, the second mate, carpenter, cook, steward, one able seaman and three boys. The evidence shows, I think, that the mate afterwards left the ship to sleep on shore and did not return before four o'clock Friday morning. A night watchman came on board during the evening, but whether he remained on board all night did not appear. The steam pump was in charge of an engineer named Johnson, and other men, how many does not appear. The captain turned in between eight and nine o'clock and none of the ship's company remained on deck. During the night the steam pump stopped. It failed to keep the ship clear. The cause of the failure does not appear. The weather was very cold but there is no evidence which justifies the conclusion that it was the cold that disabled the pump, or indeed that anything disabled it. There is proof of a conversation in the morning between the engineer and the mate, in which the engineer complained that it was out of order.

The Ship Shand.

The evidence is that it was a good and suitable pump, and that the men who were manning it were men who had experience in that work. In the morning it was found that it had failed to keep the ship clear. The lower hold where the sugar was stowed was flooded. The water had risen higher among the mats of sugar than it had ever been before.* Neither the engineer nor the men in charge of the pump, nor the watchman were called as witnesses, and no attempt has been made to explain why or how the accident happened. No alarm was given during the night. The captain was not called nor notified that the pumping had stopped. After the discovery was made in the morning, the steam pump was started again and the ship was pumped out and thereafter kept pumped out as before. For the loss caused by this flooding on the night of the 28th of December, the libellants claim damages. That there was a very large wastage of the sugar from this cause, which is not to be attributed to the effect of the water in her before she was first pumped out, is very evident. The claimants, however, insist that this loss and damage as well as the other is to be attributed to the same peril of the sea; that it was caused by the leak in the ship, which was a continuing peril of the sea; and they claim as to this particular part of the loss that the same having been caused by a peril of the sea, the burden is on the libellants to show that the ship has been guilty of negligence in not guarding against the peril; that such negligence has not been shown: on the contrary, that it is affirmatively shown that the master did all that could have been reasonably required of him under the circumstances of the case; that he employed proper and efficient means to keep the ship clear of water; that having done that, he was not chargeable with negligence if those means became ineffectual through the

*See *The Ship Shand*, 4 Fed. Rep. 925.

The Ship Shand.

fault or negligence of those in charge of the steam pump. It is further claimed on the part of the owners of the ship, that the master in employing the steam pump was not acting merely as the agent of the ship, but in a case of necessity and distress as agent for all concerned, cargo as well as ship, and that being the agent of the libellants in thus employing the pump and those in charge of it, they cannot recover of the ship for a loss resulting from the negligence of the libellants' own agents. It is further claimed that the Coast Wrecking Company in this service acted as salvors; that ship and cargo were in imminent peril, and that the service rendered by the Coast Wrecking Company was in fact a salvage service and if through the negligence of the salvors a loss happens to the cargo, its owners have no remedy against the ship.

Assuming that the leak in this ship was caused by a peril of the sea and that this loss now in question resulted from the same leak, the question is, what is the duty of the ship in protecting the cargo against a peril of the sea which threatens its safety, or, which is the same thing, against damage, which threatens to result from an injury to the ship caused by a peril of the sea. The duty of the ship to the owner of the cargo, in this respect, has been so conclusively determined in this country that it is necessary only to quote the language of the Supreme Court in the case of the *Propeller Niagara v. Cordes*, 21 How. 7. In that case the court say, p. 26: "Carriers by water are liable at common law and independent of any statutory provision for losses arising from the acts or negligence of others, to the same extent and upon the same principles as carriers by land—that is to say, they are in the nature of insurers and are liable, as before remarked, in all events and for any loss however sustained, unless it happen from the act of God, or the public enemy, or by the act of the shipper or from some other cause or accident, expressly ex-

The Ship Shand.

cepted in the bill of lading. Duties remain to be performed by the owner or the master as the agent of the owner after the vessel is wrecked or disabled, and after he has ascertained that he can neither procure another vessel nor repair his own, and those too of a very important character, arising immediately out of his original undertaking to carry the goods safely to their place of destination. His obligation to take all possible care of the goods still continues and is by no means discharged or lessened, while it appears that the goods have not perished with the wreck and certainly not where, as in this case, the vessel is only stranded on the beach. Such disasters are of frequent occurrence along the sea coast in certain seasons of the year, as well as on the lakes, and it cannot for a moment be admitted that the duties and liabilities of a carrier or master are varied or in any manner lessened by the happening of such an event. Safe custody is as much the duty of a carrier as conveyance and delivery, and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce and over which he has no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence. An effort was made by able counsel in *King v. Shepard* (3 Story C. C. 358), to maintain the proposition assumed by the respondents in this case that the duties of a carrier after the ship was wrecked or stranded, were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction the doctrine and held that his obligations, liabilities and duties as a common carrier still continued, and that he was bound to show that no human diligence, skill or care,

The Ship Shand.

could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking and the meaning of the contract, as universally understood in courts of justice. Admit the proposition, and it is no longer true that where there is no provision in the contract of affreightment, varying the liability of the carrier, he cannot relieve himself from liability for injuries to goods entrusted to his care except by proving that it was the result of some natural and inevitable necessity, superior to all human agency, or of a force exerted by a public enemy." The contract of carriage in the present case, by the bill of lading, is an absolute promise to carry and deliver in good order and condition, the perils of the seas only excepted, and no distinction can be made nor do the learned counsel for the claimants attempt any between this case and the case of a common carrier, as respects the duty of the ship or master to protect and preserve the cargo. And indeed the evidence shows that the Shand was on this voyage a general ship. And clearly if the duty of the ship in this respect is not varied nor lessened in case the vessel is wrecked or stranded, it cannot be varied or lessened, because she has sprung a leak which threatens the cargo with damage. And on this subject the Supreme Court further says, p. 28: "His duties as carrier are not ended until the goods are delivered at their place of destination or are returned to the possession of the shipper or kept safely until the shipper can resume their possession, or they are otherwise disposed of according to law. (*King v. Shepard*, 3 Story C. C. 349; *Abbott on Shipping*, 8th Ed. 478.) These authorities are sufficient, it is believed, to demonstrate the proposition that where a loss or damage is shown it is incumbent upon the carrier to bring it within the excepted peril in order to discharge himself from responsibility. It is not sufficient without more

The Ship Shand.

to show that the vessel was stranded, to bring the goods within the exception set up in the case. Had the goods perished with the wreck, it would be clear that the loss was the immediate consequence of the stranding of the vessel, and assuming that the disaster to the vessel was the result of the excepted peril, or of some natural and inevitable accident, then the carrier would be discharged. All the evidence in this case, however, shows the facts to be otherwise—that the goods did not perish at the time the steamer was stranded, and the damage having since occurred, the rule of law to be ascertained is the one applicable in cases where the injury complained of arises subsequently to the disaster to the vessel. Such interruptions to a voyage are of frequent occurrence, and the rule of law is just and reasonable which holds that the master is bound to the utmost exertions in his power to save the goods from the impending peril, as it is no more than a prudent man would do, under like circumstances. In great dangers great care is the ordinary care of prudent men, and in great emergencies prudent men employ their best exertions, so that the difference in the rule contended for and the one here laid down is much less than at first appears. Nevertheless there is a difference, and in a question of so much practical importance it is necessary to adhere strictly to the correct rule. Losses arising from the dangers of navigation within the meaning of the exception set up in this case are not such as are in any degree produced from the intervention of man. They are such as happen in spite of human exertion, and which cannot be prevented by human skill and prudence. When such efforts fail to save the goods from the excepted peril, the ultimate damage and loss in judgment of law results from the first cause, upon the ground that when human exertions are insufficient to ward off the consequences, the excepted peril may be regarded as

The Ship Shand.

continuing its operation." And in that case, by the application of the principles thus declared, the ship was held liable for the negligence of the master in not availing himself of the means shown to have been within his reach at a short distance from the ship on the shore for the storage and preservation of the goods, although they ultimately perished from being left in the stranded vessel. In the case of *King v. Shephard*, 3 Story C. C. 349, the owners of the ship were held liable to the shipper of specie embezzled by salvors employed by the master to save the cargo after the wreck of the ship, such a loss being held not within the exception of perils of the sea. Judge Story says: "My own opinion is, that the loss of this coin was occasioned solely by embezzlement or theft; and it matters not whether it was by the officers or crew of the ship, or by the salvors employed by the master."

These cases, as it seems to me, are singularly applicable to the present case, and are conclusive to the point that the master was bound by the contract of affreightment, upon the happening of the disaster which befell his ship, the springing of the leak, to employ all possible means within his reach to protect the goods against the danger which the leak threatened them with,—that he was bound under his original agreement for the safe carriage and delivery of the goods, not only to employ all the resources of his ship's company to this end, but on his arrival in port, where other and more efficient aid could be procured, to employ such other means for the effectual preservation of the cargo against the consequences that might be expected to result to it from the leak; that though that leak was caused by a peril of the sea, this employment of extraordinary means to resist and control it was a duty of the master as agent and representative of the owners of the ship under their contract with

The Ship Shand.

the owners of the cargo, and not a duty thrust upon the master *ex necessitate*, as agent for the owners of the cargo. In the case of *The Niagara*, the stranded condition of the vessel was a continuing peril to the cargo and was itself caused by a peril of the sea, yet the loss of the goods was not caused by the peril of sea within the meaning of the exception, because the master could, by means at his command, extraordinary in their character, that is, means independent of and outside of the resources of his ship and his ship's company, have saved the goods from this threatened peril. So here the leak threatened damage to the goods. The master had means at hand by the employment of men and machinery to control that leak. He was bound to employ those men and that machinery, and the fact, if it be a fact, that the peril of the ship and cargo was so great that the service rendered will, on grounds of public policy, be rewarded at salvage rates of compensation, does not make the employment of these means any the less an act done by the master in the performance of the contract of the ship with the owners of the cargo. I think these authorities are sufficient to show that there is no ground for the claim that the men working the steam pump were not in the employ of the ship, or that the possible claim of the Coast Wrecking Company for salvage compensation can make any difference in the liability of the ship for the negligence of the men employed in working the pump as well as for the immediate negligence of the master, officers or crew. A ship is liable for the result of negligence, though the negligence be that of one of the crew, as in case the fault is that of the lookout. If there may be cases where the overpowering necessity for assistance is such that the master may surrender to salvors the entire control of ship and cargo, that certainly was not this case. His duty was plain. The vessel was leaking.

The Ship Shand.

Salt water would damage the cargo. It was his duty to keep her pumped out. The means at hand were ample. He employed men and machinery for this purpose. There is nothing in the evidence which warrants the conclusion that he in fact surrendered the care or control of the ship to the Coast Wrecking Company, or understood that he did, nor were the circumstances such as would have justified him in doing so, if he so intended. On the contrary, all that is proved is that the ship's agents hired of that company a pump and men to run it, and sent it to the ship. The pump and the men were subject to the master's orders. He could at any time have sent them away and employed other persons and other machinery, to do the pumping. I see no principle upon which the ship can be relieved from responsibility for the negligence of the persons thus employed.

As Judge Story says, in *King v. Shephard*, 3 Story C. C. 360 : "The rules which regulate losses under policies of insurance are by no means the same as those which either necessarily or ordinarily govern in cases of common carriers. Each contract has its own peculiarities and principles of interpretation ; and it is not safe, in many instances, to reason from one to the other." So it may be said that although by the principles of general average or of salvage, extraordinary expenses incurred by the master are, under certain circumstances, a charge in part upon the cargo, it cannot be safely concluded from that circumstance that as between the master and the owner of the cargo the incurring of the expense was not the duty of the master by force of the bill of lading. General average and salvage contribution rest not on contract, but on reasons of public policy, adopted and enforced for the furtherance of the interests of commerce. The foregoing remarks dispose of the point made for the claimants, that an extraordinary exigency had arisen which threw on

The Ship Shand.

the master *ex necessitate* the character of agent of the shipper, and that in the employment of the steam pump he was acting as such agent, in support of which the learned counsel cite the case of *The Gratitude* and other cases. The cases cited refer to the agency of the master thus created to do something with the cargo outside of that which he is already authorized to do with it by the contract of affreightment, as, for instance, to sell or hypothecate it. Those authorities are not in point to show that the master is ever made the agent of the owner of the cargo to preserve and protect it. Such preservation and protection are of the very substance of the ship's contract, with the cargo owner, and therefore what the master does in that regard is done for the ship and there is no necessity for creating by a legal fiction any new agency to authorize or require him to do this duty towards the cargo. It is obvious, therefore, that these authorities have no application to the present case.

The English cases cited show that the courts in England do not hold the ship to so strict a liability as our courts for preventing damage to the cargo from the effect of a threatened peril of the sea. In the recent case of *Nugent v. Smith*, L. R. 1 C. B. Div. 423, it was held that the loss or damage is caused by a peril of the sea if "by no reasonable precaution under the circumstances could it have been prevented." And singularly enough the court cites the authority of Judge Story, in support of this milder rule of liability and in opposition to the stricter rule, which, as appears above, has been adopted by our own Supreme Court, partly, at least, on Judge Story's authority. They quote Story on Bailments, p. 512, as follows: "Hence it is, if the loss occurs by a peril of the sea, which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such

The Ship Shand.

a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party." And the court go on to say: "Story here speaks only of '*ordinary* exertion of human skill and prudence and the exercise of *reasonable* skill and diligence.' In my opinion this is the true view of the matter, and what Story here says of perils of the sea applies, I think, equally to the perils of the sea coming within the designation of 'acts of God.' In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible to ensure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity to the effects of such *vis major*, as the act of God." The language here cited from Judge Story is almost identical with that used by him in his decision of the case of *The Reeside*, 2 Sumn. 571. And the court seems not to have observed his more full and exact exposition of what he understood to be the law in this respect contained in the later case of *King v. Shephard*, 3 Story 358, cited above.

But even under the English rule, it was clearly the duty of the master to keep this ship pumped out, for the preservation of the cargo, and no case is referred to which will relieve the owners of the ship from the consequences of not keeping her pumped out, if the failure to do so was the result of the negligence of those employed by the ship for that purpose. And to hold otherwise would virtually allow the master of the ship in any exigency or condition of distress, however slight, to delegate to other parties those duties which, under the contract, the ship has assumed towards the owner of the cargo, holding him only to due diligence in the

The Ship Shand.

choice of the agency so employed. This would be fatal to that security which the law merchant has thrown around the goods entrusted entirely to the care and custody of the ship, and to that rule of vigilance which the law, for wise reasons of public policy, has imposed upon the master and crew as the chief support of that security. It would, as it seems to me, be not only without sanction from authority, but most disastrous to the interests of commerce.

The questions raised as to the burden of proof and as to whether the libellants have sustained the burden which is upon them, are very easily disposed of, so far as this case is concerned. Where goods are carried under a bill of lading which stipulates for their delivery in good order and condition, excepting certain perils, as the perils of the sea or the act of God, proof of the failure to deliver the goods in good order throws the burden on the ship-owner to show that the damage resulted from the excepted peril. (*Clark v. Barnwell*, 12 How. 280.) If, then, it appears by the proofs offered that the damage resulted from a sea peril, this is *prima facie* sufficient to bring the case within the exception. (*Id.*; *Transp. Co. v. Downer*, 11 Wall. 134.) Therefore, where the evidence which shows that the damage resulted from a sea peril does not also show that there were available to the master means of avoiding the damage which threatened the goods, then the libellant must go further and show that though the goods perished as the result of the excepted peril, yet that there were means within reach of the master by which he could have averted the peril. Negligence is not presumed from the mere occurrence of an accident, "except where the accident proceeds from an act of such a character, that when due care is taken in its performance no injury ordinarily ensues from it in similar cases, or [except] where it is caused by the mismanagement or misconstruction of a

The Ship Shand.

thing over which the defendant has immediate control and for the management and construction of which he is responsible." (*Transp. Co. v. Downer*, 11 Wall. 134.) But there is no case which goes so far as to hold that because the goods were damaged in consequence of a sea peril any greater burden is thrown on the libellant than to show that the master had at his command the means to have averted the threatened danger. The proof of that and the further admitted or proved circumstance, that the danger was not averted, is evidence from which the presumption of negligence in the use of those means at once arises. It is, unexplained, sufficient proof of negligence. The presumption is of the same general character as that presumption of negligence which arises in the first instance upon proof of the failure to deliver the goods in an undamaged condition. The cases relied on by claimants to sustain their position that the libellants should have gone further and affirmatively proved that the pump failed through the negligence of the engineer or those in charge of it, are not in point. They are cases where the loss was shown to be ultimately traceable to a peril of the sea and where the evidence disclosed no available means on the part of the ship to have averted the danger to the goods. Now in the present case it appears that the means at the master's command were ample. The ship's pumps were sufficient for that purpose, if properly manned. He undoubtedly had a right to use the steam pump in place of the ship's pumps if he chose to do so, but having employed this new agency he was bound by the same rule of vigilance that governed his whole conduct toward the cargo, to see to it that the pump was efficient and properly used. There certainly is no presumption that the stoppage of the steam pump was caused by an inevitable accident. And the failure to call the engineer or others in charge of it, to explain the fact, is fatal

The Ship Shand.

to the supposition. It must be assumed that their testimony would not aid the claimants. But if the steam pump did break down, the duty of the master was equally plain to put the ship's pumps at work at once. His ship's company, reduced as it was, consisted of ten men and boys, and the men in charge of the steam pump were at his service. The danger could thus have been wholly or partially averted until further help could be obtained. Thus the libellants have clearly made out a case of negligence in the failure to keep the ship pumped out, and for all damage to the cargo resulting from the ship being flooded on the night of the 28th of December they are entitled to recover.

A further claim is made by the libellants for damage to the cargo by the exposure of the bottom of the sugar to the water, in consequence of the suction pipe of the steam pump not reaching lower than the platform. All the time that the ship was discharging and while the steam pump was at work the water was necessarily allowed to rise somewhat above the point reached by this pump to enable the pump to work. Upon the proofs, I think it appears that some small part of the lower portion of the sugar was thus constantly being alternately submerged and drained of water. This process necessarily carried off more or less of the sugar, and for this damage the ship is clearly responsible. No excuse or reason is shown or suggested why the pipe was not lengthened or why the ship's pumps, which reached this water, were not employed to pump it out, if there was any difficulty or necessary delay in properly adjusting the steam pump. The claimants insist that the loss attributable to this cause is too trifling to be charged against the ship, but the negligence being entirely clear the amount of the damage is not material. Whatever loss ensued from this cause the ship is liable for.

The Ship Shand.

A further claim of damage is made in consequence of delay in delivering the cargo. The delivery stopped at some time on Saturday, December 30th, and was not resumed until Wednesday, January 3d. The cause of the stoppage was that the ship became crank, and the ballast which the consignees of the ship had intended to put on board for the outward voyage was not at hand on Saturday, and owing to the intervention of Sunday and New Year's day and the severity of the weather, the ballast was not got to the ship till Tuesday afternoon, although when it was discovered that the ship was getting crank some efforts were made to hurry it up. The effect of the delay was to increase to some extent the necessary loss by drainage of this mass of wet sugar. That the ship owner owes some duty to the owner of the cargo in the preservation from further loss of goods already damaged by a sea peril is unquestionable. (*Notara v. Henderson*, L. R. 7 Q. B. 225.) There is nothing unlawful or in the view of the maritime law improper in the delivery of cargo on Sunday or festival days, especially where such delivery is necessary to avert loss. (*Richardson v. Goddard*, 23 How. 28.) And although a carrier seems not to be held generally to more than reasonable diligence as respects *the time* of delivery (*Briddon v. The Great Northern Railway Company*, 28 L. J. N. S. (Com. L.) p. 51), yet it seems but reasonable that the delivery should be continued on Sundays and holidays if thereby any considerable damage to the goods would be averted. But where the owner of the goods is at hand and knows the circumstances and no request to do this is made, it may be doubted if the ship is chargeable with negligence from this cause. It seems, however, unnecessary at this stage of the case to determine these questions, or the further question whether there was fault in not having the ballast at the ship on Saturday, because so far as the loss which result-

The Brig Sloga.

ed from the flooding of the ship on Thursday night was aggravated by any delay in delivery, the ship is liable for that additional loss as a part of the loss caused by the flooding, and it does not distinctly appear that the loss necessarily resulting from the original wetting of the cargo was appreciably enhanced by the slowness of the delivery. Therefore, any such question of liability may well be left till the report of the commissioner as to the amount of the damage shall disclose the fact that the question really arises.

Decree for libellants and reference to compute damages.

For libellants, *R. D. Benedict.*

For claimants, *T. E. Stillman & W. A. Butler.*

FEBRUARY, 1879.

THE BRIG SLOGA.

DAMAGE TO CARGO.—BURDEN OF PROOF.—STOWAGE AND DUNNAGE.

A brig having taken on board at Pernambuco a quantity of mats of sugar to be brought to New York, under a charter and bills of lading which excepted perils of the seas, the sugar on her arrival at New York was found to have been washed entirely out of some mats and partly out of others. The consignees filed a libel against the brig to recover the loss as being occasioned by bad stowage and lack of sufficient dunnage. The sugar was green sugar and liable on that account to excessive drainage, but it appeared that twelve per cent was the limit of drainage usual in such sugars on such a voyage, which was much less than this had lost. It appeared that the brig met with

The Brig Sloga.

severe weather on the voyage, but the log showed that she was kept pumped during the voyage and that the pumps were able to keep her free all the time, and she made no more water after the heaviest gale than at first:

Held, That the burden was on the brig to show that the loss was occasioned by a peril of the sea, the consequences of which could not have been guarded against by the master and crew with the means available to them;

That the comparatively good condition of the top of the cargo showed that the loss was not occasioned by the vessel's having taken in water through the seams of the deck;

That, as appeared from her log, the crew had been at all times able to control the leak, and the water did not appear at any time to have been as deep in her as the platform on which the sugar was stowed, and that the injury to the sugar was caused by the water reaching it in the bilges when the vessel rolled;

That, on the evidence, the vessel did not have sufficient dunnage under the cargo in the bilges to protect the cargo from such injury; that such lack of dunnage was bad stowage and the vessel was liable for the damage to the cargo therefrom.

CHOATE, J. This is a libel by Edward F. Davison *et al.* against the brig Sloga for failure to deliver in good order and condition a cargo of sugar shipped at Pernambuco under charter and bill of lading, which excepted only "all the dangers and accidents of the seas and navigation of whatsoever kind." The vessel left Pernambuco on the 13th of November, 1873, having shipped 5100 bags of green sugar consigned to the libellants. Her voyage was from Pernambuco to Hampton Roads for orders and thence to her port of discharge. She arrived at Hampton Roads and there received her orders for New York and arrived in this port January 19th, 1874. Upon the delivery of her cargo, it was found that 59 bags were entirely empty and 329 bags slack and greatly reduced in the quantity of their contents, and it is to recover damage for this loss that the suit is brought. The libel, after alleging the failure to deliver according to the bill of lading, charges that the loss was caused by the "careless,

The Brig Sloga.

negligent and improper manner in which the said merchandise was stowed and the absence and want of proper dunnage and the want of proper care on the part of the master, his officers and crew and persons employed by him or them, and by reason of their careless and negligent failure to furnish proper, or any dunnage, in the bilge, and between the sugar and sides of the vessel many bags of sugar were sweated and stained by sea water and the heat of the vessel, by reason of such want of proper dunnage, whereby the sugar ran out of many of the bags entirely, and partly out of other bags, from leakage and from sea water blown through the ceiling in heavy weather." The answer avers that the sugar was shipped in bad condition; that it was new and raw sugar, dripping with molasses when shipped; that the sugar was stowed by a stevedore exclusively employed and controlled by the shipper, and that therefore the ship is not responsible for any fault in the stowage; that the cargo was, in fact, well and properly stowed and strictly in accordance with the custom of the port of Pernambuco; that the loss of weight was caused by the raw and green condition of the sugar and the great quantity of molasses that drained out of it; that the vessel encountered heavy gales, losing spars and sails, having her decks swept many days by the sea; that though the brig was tight, staunch and strong, she was strained by the violence of the wind and sea, and took in water through her seams, and that by the rocking and pitching on the sea the pressure of the cargo was increased and by this pressure the molasses was more and more pressed out, and that this was the cause of some of the bags being found empty and others greatly reduced in weight.

As to the defence that the ship is not responsible because the shippers undertook to stow the cargo themselves, it is enough to say that by the terms of the charter party the

The Brig Sloga.

ship was clearly bound to receive and stow the cargo, and there is no evidence that by any other or subsequent agreement she was ever released from this obligation. And I do not understand that the testimony of the master is that he did not receive and direct the stowage of the cargo. At any rate, if it will bear that construction, it is not sufficient proof of the fact against the evidence of the charter party and bill of lading and the testimony taken at Pernambuco.

The cargo consisted of green or unclayed sugar, and the proof is clear that such sugars are subject to a considerable loss of weight; but the evidence is positive and sufficient to show that this cargo consisted of bags of sugar in good order and condition, for this class of sugars, when shipped, and while the ship must have the benefit of a full allowance for loss of weight, so far as it can be probably attributed to the dripping of the molasses from such sugar, yet there is nothing in the evidence which warrants the conclusion that from the mere character and nature of the sugars, even when submitted to the heavy pressure caused by the superincumbent weight of cargo or the rocking and tossing of the ship at sea in heavy weather, the bags would be entirely emptied of their contents or shrunk, as the bags were in this case. So far as evidence has been given on that point, twelve per cent loss of weight is about the limit to be ascribed to this cause. The fact that the bill of lading contained the words "weight and contents unknown," is of no importance in this case, first, because these words, being part of the printed blank used for making out the bill of lading, are controlled by the written parts of the bill which give the number of bags of sugar received and their weight, and, secondly, because the proof is sufficient as to the actual weight and condition of the sugar delivered to the ship.

The Brig Sloga.

There is some confusion and contradiction in the testimony as to whereabouts in the ship these empty and slack bags were found, but the weight of the evidence is that they were found in the bottom of the cargo, some on the platform on which the cargo was laid and along the keelson, but the greater part of them in the bilges of the vessel. It is proved by the testimony of both sides that the upper part of the cargo was found to be in good order, somewhat stained by the sweat of the hold or by sea water blown in about the hatches, but not appreciably injured or showing any marks of having been so wet from above as to be reduced in weight from that cause. I take this to be conclusive evidence that while there is no possible explanation of the condition of the empty and slack bags except that the sugar was washed out by sea water, the water which did the damage did not come from above through the deck or hatches and find its way thus through the mass of the sugar to the bottom. It also appears that the inner ceiling of the ship was well caulked and that after the discharge hardened sugar was observed upon the sides of the ceiling where the bags had rested. It would be contrary to the evidence, therefore, to conclude that the sea water which did the damage was blown through this inner ceiling, as seems to be suggested in the libel, or that it found its way down along this ceiling from above to the lower part of the hold. At the bottom of the hold, and raised fourteen inches above the bottom of the ship at the keelson, was a permanent platform of planks, running athwart-ships at a very slight incline upwards and joining the side at the bilge keelson where the caulked inner ceiling stopped. This platform was of planks laid close together but not caulked, nor was it water-tight, and the effect of all the evidence is that the sea water which did the damage reached the cargo through this platform from the bottom of the ship.

The Brig Sloga.

The rule of law to be applied to this case is too well settled to require any extended comment. The ship is bound by its contract to deliver the cargo in good order and condition, unless prevented from doing so by the excepted peril. If the cargo is delivered in a damaged condition, the burden is on the ship to show that the case comes within the exception contained in the bill of lading. If, then, the ship shows that it has encountered a sea peril to which the injury can be properly attributed, and that peril is shown to have been adequate to produce the injury, and it does not appear that there were at the command of the master sufficient means to overcome the peril or prevent the damage likely to result therefrom to the cargo, then the ship will be held to have made out a *prima facie* defence and it will be incumbent on the libellants to produce further evidence of negligence. (*Clark v. Barnwell*, 12 How. 270; *Propeller Niagara v. Cordes*, 21 How. 7; *Transp. Co. v. Downer*, 11 Wall. 129; *The Shand*, ante p. 294.) But the ship does not excuse damage to the cargo as caused by a peril of the sea if the damage could have been prevented, notwithstanding the peril encountered, by the utmost exertions of the master and crew and the full use of all the resources at the command of the ship. (*Same cases.*)

Now, in this case, the defence attempted is that the damage, so far as it is not attributable to the intrinsic character of the sugar itself, was caused by perils of the sea—that the cargo, being properly stowed and dunnaged, was injured by sea water taken in during violent storms and heavy weather at sea, and which washed the cargo and melted and washed the sugar, in spite of the necessary diligence and care of the master and crew. This defence is to be determined by the decision of two questions: *first*, did the ship, through stress of weather and the violence of the winds and seas, take in so

The Brig Sloga.

much sea water as can account for the damage done to the cargo, and which damage the utmost exertions of the ship's company were unable to prevent and resist?—and, *secondly*, was the injury caused in whole or in part by bad stowage of the cargo and insufficient dunnage? As to the first of these questions, the evidence is chiefly to be drawn from the testimony of the master, officers and crew, and from the log of the vessel. By the log and all the testimony, it appears that the brig was a remarkably tight ship. The fact has already been referred to, that though she encountered very rough weather, and her decks were swept by the seas, she took no water in, in that way, of any consequence. The log and testimony show that, while she was lying at Pernambuco receiving her cargo, she made almost no water, her pumps bringing up molasses which drained out of the sugar. On the day she left port the entry in the log is “pump gave five inches molasses every twelve hours,” and on the second day out with smooth sea, “three inches water mixed with molasses every eight hours,” and the same entry occurs on the 26th of November and afterwards at intervals till the 5th of December, and again on the 19th and 21st of December. It was not till the 23rd of December that the vessel met any rough weather. On that day the weather became bad towards night, and by the log at midnight the wind blew a gale from the S. E. and the sea began to wash the deck. The log contains the entry: “Pumping is done every two hours, making three to four inches water.” On the 24th, the sea was very rough, “causing her to roll fearfully,” “three to four inches water pumped.” At noon of the 25th, “a fearful gale breaks out, with such a heavy sea that the deck is filled with water, washing several things, the kitchen, the fowl basket, etc. The pump is at work every hour, and fear is entertained that the cargo has been damaged by the rolling of the vessel.

The Brig Sloga.

On the 26th, "a furious gale and deck continually under water. About 2 p. m. the wind nearly oversets the vessel, rendering her steerless," "pumping done every hour to avoid damage to cargo." For the next four days the log shows strong winds and heavy seas, the pumps being worked with "usual rate of water," and that without further noticeable weather or any observable leak she arrived at Hampton Roads on the 2nd of January. She left Hampton Roads January 11th. On the 12th, by the log, with pretty rough sea, "pumping was done every six hours, making always water mixed with molasses." On the 13th, "pumping was done every four hours." On the 15th, "every two hours." The next two days were clear and pleasant. On the 17th, "pumping done every twelve hours, making water mixed with molasses." On the 18th they took the pilot and a tug to bring them to an anchorage in this port. The testimony of the master and crew certainly adds little or nothing to the strength of the evidence to be gathered from the log as to the perils of the sea encountered upon this voyage. The captain testified that they had good weather during the earlier part of the voyage; that they pumped every twelve hours, pumping out molasses, but very little water; that they had very hard weather by Cape Hatteras, commencing about the 23rd of December, the first gale lasting about twenty-four hours, so that they had to lay to, losing some sails, the kitchen, etc., and some of the bulwarks; that on the 26th and 27th they had a still heavier gale, and he says that in the heavy weather they pumped every hour and found she was leaking three inches an hour, but he says *they kept her free*, that they pumped up molasses with water. After that, till they arrived at Hampton Roads, the weather was more moderate, and they pumped every two, every four, and every six hours. As to the weather after leaving the

The Brig Sloga.

Roads, he says that for the first few days it was very rough weather, a gale continuing two days with a rough cross sea. It is to be observed that the pumping up of molasses mixed with water was an incident of the entire voyage and not noticeably increased after the greatest gale they encountered, on the 26th and 27th of December. One of the crew testifies that during the fine weather after leaving Pernambuco they pumped every six or every twelve hours, according to the weather, that it took ten to twenty minutes to free her, and that during the rough weather when they pumped once an hour, it took ten to fifteen minutes to free her. The mate testified that during the gale of the 26th of December, she was on her beam ends ten or fifteen minutes, and that the carrying away of her sails righted her. Giving all proper credit to this evidence, it is apparent that the vessel, although she met several days of very rough weather, and at least one gale of exceptional violence, yet at no time had any leak which was not entirely under the control of the crew, nor was the weather such at any time as prevented the regular working of the pumps and keeping the vessel free of water. If the pumps were diligently attended and she was kept free, as the officers and crew swear, it is difficult to account for so large damage by sea water as is proved in this case, provided the cargo was properly stowed and dunnaged. While a vessel is not to be expected to stow and dunnage her cargo to keep it out of the reach of the water if she springs a leak which cannot be controlled by the pumps, it is not too much to require her upon an Atlantic voyage in winter to stow and dunnage it so that if her pumps work well and she does not spring a leak which they cannot control, the cargo shall be safe from damage by sea water from the mere rolling and pitching of the vessel in the sea in heavy weather, and an occasional severe gale. And upon the whole testimony I do

The Brig Sloga.

not think I should be warranted in holding that the ship has shown that she encountered such perils of the sea, adequate to account for the damage, and uncontrollable by the resources at the command of the ship, as will account for the damage and throw upon the libellants the burden of making out a further case of negligence. In this posture of the case it is not for the libellants to prove affirmatively how it was that the water rose in the ship so as to submerge the cargo. Negligence of the ship is presumed from the fact that the damage was done and that the means of preventing it were at hand. The ship has on this point failed to make out her defence.

On the other question, whether the ship was imperfectly dunnaged in the bilges, the evidence is very conflicting. The claimants take the ground, first, that the ship was of such a build that she needed no dunnage in the bilge except the very slight layer of bamboo mats and palm leaves which are admitted to have been there; that she was so sharp that in fact she had no bilge, and, secondly, if she had a bilge and needed dunnage, she was well dunnaged with wood, boards and planks below the palm leaves and mats. The grounds thus taken are somewhat difficult to reconcile. And it is not obvious why the master should have taken the trouble to dunnage with wood and plank, if no dunnage was necessary. As to this claim, it is enough to say that the weight of evidence is very strongly against the claimants; that the evidence does not warrant the conclusion that any thing was used to keep the bags of sugar from the skin of the ship at the bilges except mats and palm leaves and a few bamboo sticks, so laid and at such intervals as not to prevent the bags of sugar from being closely pressed down against the skin of the vessel. On the other question, whether the build of the vessel was such as to require dunnage at the bilges,

The Brig Sloga.

there is a great deal of testimony of experts, conflicting, of course, and much of it very unsatisfactory. The result of the testimony is, I think, that she was a sharp vessel, but not so sharp as to carry her cargo safely without several inches of additional dunnage in the bilges, such as the claimants attempted but failed to prove was there. The most satisfactory evidence on this point is the behavior of the vessel herself and the condition of her cargo when she arrived. It cannot but be admitted that in arranging the dunnage it should be so proportioned as to protect, with an approach to an equality, the different parts of the cargo. The object of dunnage in the bilges is to protect the cargo in that part when the ship rolls over or is on her beam-ends, whereby this shall be brought to be the lowest part of the ship to which all the water in her will run. Now, in this case the great disproportion of the damage at the bilges seems to me to indicate that she was not proportionately well dunnaged there and this strongly confirms what I think is the weight of the evidence that she required more dunnage there. Of course the wetting of the bags of sugar in the bilges and the collecting of the water there and the drainage from these wet bags would have a strong tendency when the vessel was thrown over the other way to carry the water back along the planks of the platform towards the keelson, and in this way the washing out of the sugar in the bags along the keelson can be accounted for, even if the water was not allowed to rise so high under the platform as to have otherwise washed this part of the cargo. The water in the bilges would not all immediately find its way through the cracks of the platform, especially as the bags of sugar were not raised from the platform at all, except by the thickness of the mats and leaves.

On the ground, therefore, that the ship has failed to show that the damage to the cargo was caused by a peril of the sea,

The Brig Jeremiah.

and that it is proved that it was caused in whole or in large part by insufficient stowage and dunnage, there must be a decree for the libellants, with costs, and a reference to compute the amount of the damages.

For libellants, *Geo. H. Forster*.

For claimants, *W. R. Beebe*.

MARCH, 1879.

THE BRIG JEREMIAH.

COLLISION AT SEA OFF BARNEGAT.—SAILING VESSELS.—EVIDENCE.—
REFERENCE.

A collision took place in the night between a schooner and a brig, off Barnegat. The wind was E. N. E. and the schooner was sailing N. by E. and the brig was sailing S. by W. The schooner alleged that she saw the brig a little on her lee bow; that she kept her course; that the brig luffed and came into her, striking her on the port side. The brig alleged that she made the schooner a little on her starboard bow, being about three-quarters of a mile away, and showing no light; that the brig then luffed about three points; that the schooner then also changed her course across the bows of the brig and thus caused the collision:

Held, That the evidence of the witnesses on the brig as to a change of course on the part of the schooner did not overpower the positive evidence of the master of the schooner, who was at her wheel, that her wheel was not changed, but that she kept her course;

That what the witnesses from the schooner testified as to what they saw of the navigation of the brig agreed with the evidence from the brig as to what she did, except as to the time when it was done;

That the story of the brig's witnesses as to the alleged change of course of the schooner was not sustained;

The Brig Jeremiah.

That the evidence of the master of the schooner as to the position of the brig when she was seen was more to be relied on than was the evidence of the men on the bow of the brig as to the position of the schooner when seen, because he had the masts of his vessel to range her by ;

That on the evidence, the collision was due to careless observation on board the brig, and to the change of course which she made by luffing, instead of porting, and that she was in fault and was liable.

CHOATE, J. This is a libel by the owners of the schooner P. A. Sanders against the brig Jeremiah to recover damages for the loss of the schooner by a collision with the brig.

The collision took place about six miles off the Jersey coast, a little to the north of Barnegat, about three o'clock in the morning of the 16th of March, 1876. The schooner was bound on a voyage from Virginia to New York with a load of wood. The brig was bound on a voyage from New York to Cardenas and was light.

The case, as stated in the libel, is that the night was clear and starlight, the wind blowing about a five-knot breeze from or about E. N. E. ; that the schooner was close-hauled, sailing by the wind about N. by E. ; that the brig had the wind free and all sail set ; that when the brig was first seen she was to the leeward of the schooner, bearing directly down on her, but so as to have cleared the schooner by keeping off a little ; that instead of doing so she came directly down on the schooner, striking her on the port side between the foremast and the forerigging ; that the collision was caused by the negligence of those in charge of the brig, by not keeping a good lookout and in not keeping off, and in a general recklessness in her navigation. The answer of the brig is that the night was clear, the wind about E. N. E., a four-knot breeze, the brig on a course S. by W. ; that the lookout reported a vessel on the starboard bow ; that they

The Brig Jeremiah.

saw her sails, but no light, and she was then about three-quarters of a mile away; that she bore about half a point on the starboard bow of the brig, and immediately the mate, whose watch it was, gave an order to luff, which was done, and she came up about three points, thus bringing the schooner three to three and a half points on the starboard bow of the brig; that owing to this change of course it became necessary to haul in the braces, and the lookout was called to assist in doing so, and that this had scarcely been completed when it was discovered that the schooner had changed her course and was standing directly across the bows of the brig and was only a few feet distant from her, and instantly thereafter the collision took place; that the collision was caused by the fault of the schooner in not keeping her course, in not keeping a good lookout, and in changing her course and standing across the bows of the brig, and in not having proper lights, and in not having them properly burning.

Captain Leek, the master of the schooner, was at the wheel, and he testifies that he was sailing by the wind close-hauled, heading about N. by E.; that he had two men forward, one of whom, Wright, was acting as lookout; that the lookout reported "a vessel to leeward;" that almost at the same moment he saw the vessel approaching, about a point to leeward; that he could see her sails, but not her lights; that she was perhaps three hundred yards off; that he kept on his course, merely trying to keep her as close as possible to the wind; that she will not sail nearer than five points to the wind; that instead of keeping off the brig luffed and ran into him; that both his lights were set and burning brightly; that he took them down and blew them out after the collision. The two other men on the deck of the schooner were colored men from the eastern

The Brig Jeremiah.

shore of Maryland ; one of them, Wright, was called as a witness by the libellants. The other was not called, and it was shown that all reasonable efforts to find him had failed. Wright, who was evidently a very unintelligent person, testified that he was acting as lookout ; that he was forward on the deck load ; that they were, at the time of the collision, sailing close-hauled, N. by E., the wind being E. N. E. ; that the first he saw of the brig was about a hundred yards ahead of them a little on the lee bow ; that he sung out to the captain " a schooner on our lee bow," and that then he started and ran aft ; that when he first saw the brig she was bound down the coast and he could see both her lights. He says that the brig struck the schooner on her lee bow. When asked which bow was his lee bow, he answered the starboard bow ; he testified that he saw the captain take down and blow out the schooner's lights after the collision. He said that the deck load was nine feet high, and that from where the captain stood at the wheel he could not see anything forward on account of the deck load ; that as soon as he reported the light he went aft, and before he got aft the vessels were together. He further said that the wind struck on the port side of the schooner. It is evident that unless the schooner changed her course just before the collision, this witness has confounded port and starboard, for it admits of no question that the wind had, until just before the collision, been on the starboard side of the schooner, and her port side was her lee side. And all the witnesses agree that she was struck on her port side.

On the brig it was the mate's watch. The mate and two men were on deck, and they were all called as witnesses by the claimants. Anderson, the man at the wheel, testified that he was steering S. by W. by compass ; that they were sailing about four miles an hour, the wind being E. N. E.,

NEW YORK,

out sung out "a vessel
mate was standing
ward, and after going
he obeyed the order and
on that course; that
nt to brace the fore-
er till they were to-
hange his course till
stified that when he
r a mile and a half
all on the starboard
a vessel on the star-
ward and looked and
the brig did luff; that
to help haul in the
ooner she was across
came together; that
aw her sails and both
to be coming nearly
that he didn't look at
the fore-castle deck to
ass his bows. Brown,
leading S. by W. right
reported a vessel on the
and saw the vessel a
a point, about a mile
sails; that he ordered
three points and a
till his vessel came
of course the regular
ould judge; that it be-
ces, and he called off
then the vessels were

The Brig Jeremiah.

three-quarters of a mile apart; that after hauling in the braces he looked to leeward and there saw the schooner twenty feet off crossing their bow from their starboard to their port; that she was heading straight across their bow. The captain of the brig, who was below, came up on the noise of the collision, and testified that his vessel was then heading S. S. W. by the compass; and that the schooner was heading E. N. E. as near as he could judge.

It is perfectly evident that if the story of those on the brig is true and the schooner kept on her course, no collision could have taken place; that the brig, being on the windward or starboard hand of the schooner and then luffing three points, the two vessels would have got further and further out of each other's way every instant and would have passed each other at a considerable distance, if they were, as those on the brig say, not less than three-quarters of a mile apart when the brig luffed. But it is the theory of the claimants that after the brig luffed the schooner ported, came up in the wind and went off on the other tack and thus intercepted the course of the brig and stood across her bows. And it is the claim of the brig, in explanation of the fact, that those in charge of the brig kept no lookout for the schooner after luffing, that this manœuvre of the brig was made at such a safe distance that the brig had a right to pass on either side, and that after luffing the vessels were not in a position relatively to each other such as to involve danger of collision, and that therefore, and because it was the duty of the schooner to keep on her course, the brig was not chargeable with any further duty of observing her movements. It is clear that this is the only theory that can explain the collision, if the schooner changed her course at all, and if the story of those on the brig is correct, for if the schooner made any other change it is demonstrably impossi-

NEW YORK,

together; clearly so if
to the northward, and
come up in the wind
k, for she would have
e overtaken the brig.
the collision is that
or proof. It is not
ey saw any such ma-
They all admit that
er luffing till the ves-
when they luffed she was
ses from the brig are
se to them when they
bows of the brig, and
of her position and
ations as to the effect
eping on her course,
eir stern and been far
e concerned, therefore, this
the supposition that
on or judgment. Such
usly careless as these
unless backed up by
the entire evidence.
the schooner they did
They thought she was
out seeing her lights
movements was neces-
their own manoeuvre
distance and course,
they had done enough,
his or any other ves-
ship's duty. This was

The Brig Jeremiah.

gross carelessness which suggests of itself a prior inaccurate and careless observation of the schooner's position and movements. The theory is also utterly inconsistent with the positive testimony of those on the schooner as to her movements. Capt. Leek, who was at the wheel, swears positively that he kept her by the wind, heading N. by E; that he saw the brig near at hand on the lee bow when she was reported; that the brig luffed and ran into him. The facts testified to by Capt. Leek are such that he must have told a deliberate falsehood if the schooner in fact, went up in the wind and stood off on the other tack, changing to the eastward and southward ten points, as she must in that case have done. So far as his testimony is concerned it is not a mere question of accuracy of observation or of memory, but of truthfulness. It is also impossible to reconcile this theory with the testimony of Wright the lookout. It is true that Wright says that the starboard side was the lee side and the booms of the schooner swung to starboard, and on this statement the claimants counsel greatly relies in the support of his theory of the case that the schooner was standing on the other tack, which would have made her starboard side her lee side and would have accounted for her boom's swinging to starboard. But an attentive reading of this witness's deposition shows a hopeless confusion of mind as to the use of the words "lee" and "starboard," and upon that deposition alone it might be concluded with great probability, that he had by mistake used these words erroneously. Thus, he says the brig struck the schooner's *lee bow*. It is admitted her port bow was struck. Therefore he cannot really have understood or intended to say that the starboard side was the lee side at the time of the collision. All the evidence in the case was taken by deposition, which does not afford the same opportunities for correcting

The Brig Jeremiah.

mistakes in testimony, as in case of testimony given before the court when the parties and witnesses are all present. But independently of this it is clear that Wright's testimony as a whole does not support the claimant's case. As he recollected the circumstances of the collision the whole thing was almost instantaneous. The schooner was standing on her course close hauled by the wind, heading N. by E. when he saw and reported the brig to leeward. He ran aft and before he got there the collision occurred. He may be mistaken in the length of time and the distance of the two vessels apart when he first saw the brig. He is so unless *all* the other witnesses who testify to distance are mistaken. But he does not say the schooner came up in the wind or went off on the other tack, and such a movement is inconsistent with what he tells us that he did observe. Moreover, the exigency of the claimant's case requires that if the schooner made this movement at all she should have made it instantly after the brig luffed. Except upon that supposition she never would have overtaken the brig, especially considering the time she would lose in putting about and getting filled away and the advantage the brig had in being already to the windward and getting steady on her new course before the schooner changed. The change of the brig three points further to the south and east and of the schooner ten points to the east and south, in all a change in their relative courses of thirteen points, would, if they were before on nearly opposite courses, as seems to be conceded, bring them on converging courses, making an angle of only three points with each other, and as they were three-quarters of a mile apart when the change was made, on claimants' theory they would, if they came together at all, each have to run at least a mile before meeting each other. This is fatally irreconcilable with the whole tenor of Wright's account of the matter as

The Brig Jeremiah.

well as Capt. Leek's. This theory of the claimants is also irreconcilable with all the probabilities of the case. The schooner had no sufficient motive to stand off on the other tack. She was well clear of the land and on her proper course, and the position of the brig and the well-understood duty of the brig to keep off as the schooner saw her position, would have made it an unnecessary and foolish movement on the schooner's part. It is not supported but rather refuted by the testimony of those on the brig as to the way the vessels came together. But further detail is needless. One circumstance which claimants rely on is that the brig's starboard bow port was knocked in. Whether this was done at the instant of collision or afterwards is not directly testified to. The claimants' counsel insists that on libellants' theory the brig's port bow was more directly exposed to injury from the angle at which, on the theory of the libellants, they must have come together. This is undoubtedly so, but the circumstances of the case afforded ample opportunity for the starboard bow port of the brig to be knocked in. The vessels were locked together half an hour, the stem of the brig having crushed in the side of the schooner. The sea meanwhile was rough and rising. As the captain of the brig says, they were "chawing" and "pounding" together all this time. It is not probable that they stood perfectly still. No injury shown to either bow of the brig was an unlikely result of this "chawing and pounding" process.

The theory of the claimants being then dismissed as wholly improbable and unproved, there is no rational explanation of the collision, except that positively testified to by the master of the schooner. It involves no intentional false statement by any witness. It only involves such carelessness of observation and error of judgment on the part of those in charge of the brig as we very frequently find, and

The Brig Jeremiah.

must impute to one party or the other in collision cases, and which are, indeed, themselves the ordinary causes of collisions. The mate and lookout, even if their memory is entirely accurate, may have easily, through carelessness of observation or mere error of judgment, thought the schooner was a little on their starboard bow, when, in fact, she was a little on their port bow. A man at the wheel, as the captain of the schooner was, may, of course, misrecollect or misstate what he saw; but he cannot be mistaken at the time as to whether an object seen forward is on his port or starboard bow. His observation is aided and held to exact accuracy, by the range of the vessel's masts and bow immediately before him. He knows with certainty at the time whether he has to look to the right or the left to see the object. The element of error in observation is therefore eliminated from his testimony as to such a fact. It is otherwise with witnesses who stand on the bow of the vessel and see an object almost directly ahead. Their judgment as to whether it is a half point or a point on the one side or the other, may easily be mistaken, unless it appears that they take special pains to take the range of the vessel's course. These two witnesses vary between themselves by one point as to the bearing of the schooner. The liability of witnesses to misjudge distances in the night time, at sea, is too well known to excite remark. Everything which the master of the schooner says *he saw* the brig do, those on the brig *admit* that *they did*. The only difference is as to the time when it was done. The alleged contradiction of the master of the schooner by the look-out, Wright, as to the height of the deck load, and as to whether the master could see over it, is entitled to very little weight. The master testifies that there was a raised stand by the wheel for the purpose of enabling the man at the wheel to see forward; that his booms were raised so as

The Brig Jeremiah.

not to be in the way ; that he *did see*. With all the proofs of recklessness in navigation which collision cases afford, it is a little too improbable that the officer of the watch, who is responsible for the navigation of the vessel, should undertake to steer her with no means, in case anything is reported forward, of ascertaining what he must do without leaving his wheel. On this point I think the weight of evidence is that Wright is mistaken.

The true and only theory of this collision, then, is that the schooner made the brig on her lee bow ; that she stood on her course close-hauled by the wind ; that the brig, instead of keeping off, as she was bound to do, luffed up across the schooner's bows ; that those in charge of the brig were careless and negligent, first, in their observation of the position of the schooner ; and, secondly, in not keeping off and in luffing ; and, thirdly, in not keeping a good lookout after luffing ; that they mistook the distance of the schooner when they luffed, and that their carelessness was the sole cause of the collision. The proof of the alleged negligence on the part of the schooner in not having proper lights, in changing her course and crossing the bows of the brig and in not keeping a good lookout, has wholly failed.

As the brig has been sold, and her proceeds in the registry are admitted to be insufficient to satisfy libellants' damages, there seems to be no necessity for a reference.

Decree for libellants, with costs.

For libellants, *D. McMahon*.

For claimants, *W. R. Beebe*.

The Remnants of the Brig Jeremiah.

MARCH, 1879.

THE REMNANTS OF THE BRIG JEREMIAH.

PRIORITIES.—COLLISION.—SALVAGE AGREEMENT.—REPAIRS.—COSTS.

A brig came in collision with a schooner at sea off Barnegat. The two vessels were interlocked by the collision. A tug came to their assistance and the brig agreed to give her \$100 to pull her away from the schooner, which was done. The tug then undertook to tow both vessels, but was unable to, and the master then agreed with the master of the tug to give \$1000 to be towed back to New York, which was done in about ten hours. The weather at the time was rough, with an easterly wind increasing. After the brig reached New York some repairs were put on her and she sailed on a voyage, and on her return was libeled and sold for seamen's wages. A libel was also filed against her by the owners of the schooner to recover the damages sustained by them in the collision. And the owners of the tug filed a libel against the proceeds to recover the \$1000 which was agreed to be paid for salvage. And the parties who did the repairs also filed libels to recover the amounts due them, the brig having been a foreign vessel. The owners of the schooner having recovered a decree for their damages, which exceeded the amount remaining in the registry of the court after payment of the seamen's wages, contested the claims of the owners of the tug and of the material men:

Held, That the salvage claim had priority over the collision claim ;

That on the facts, the agreement to pay \$1000 for the salvage must be set aside as exorbitant and extorted from the master of the brig by stress of circumstances, and that the amount to be paid the tug for the service be reduced to \$500;

That the claims of the material men and of the owners of the tug must be first paid out of the proceeds and the remainder paid to the owners of the schooner ;

That as the owners of the tug and the material men had appeared by the same counsel and proctors, only one bill of costs must be taxed.

CHOATE, J. The first of these cases is a libel brought by the owners of the steam-tug H. W. Edye, to recover the sum

The Remnants of the Brig Jeremiah.

of a thousand dollars for alleged salvage services rendered to the brig Jeremiah, in pulling her apart from the schooner P. A. Sanders, with which vessel she was in collision, and afterwards in towing her into the port of New York in a crippled condition. The other cases are libels and petitions of parties having maritime liens for supplies, towage and other services against the brig, which was a foreign vessel.

On the morning of the 16th of March, 1876, the brig came into collision with the schooner above named, about six miles off the Jersey coast, a little to the north of Barnegat light. The collision took place about three o'clock in the morning, and the brig was unable to disengage herself from the schooner. The tug H. W. Edye was cruising about, looking for business, and seeing the vessels in collision, came up and offered assistance. An agreement was first made between the master of the tug and the master of the brig to pull the brig free for a hundred dollars. This was done. An attempt was then made by the tug to tow the schooner, the intention then being to tow the vessels both in together. But this intention was abandoned, as the schooner was found very difficult to tow, being full of water, but kept afloat by her cargo of wood. The master of the tug then negotiated with the master of the brig as to the terms on which he would tow the brig back to New York, from which port she had sailed on a voyage to Cardenas. After several offers made by the master of the brig had been refused, the master of the tug finally agreed to tow her in for a thousand dollars, including the hundred dollars already agreed to be paid for pulling the vessels apart. Accordingly the tug towed her in and brought her to a pier in this harbor in ten or eleven hours after getting under way. The brig has been sold under a decree of this court to pay seamen's wages, and the surplus, about three thousand five hundred dollars, has been paid into the

The Remnants of the Brig Jeremiah.

registry. The owners of the schooner, who claimed damages against the brig exceeding her value, by reason of the collision, which was caused, as they say, by the fault of the brig, appear and defend this libel, on the ground that the amount claimed as salvage is greatly excessive, and they also claim that their own damages on account of the collision are entitled to a preference.

As to the claim of the respondents that the damages on account of the collision are entitled to preference, it is clearly unfounded. It is true that the claim had attached before the service of the tug was rendered, but surely those who have acquired a claim *in rem* against a vessel for a collision stand in no better position towards subsequent salvors than they would have stood if the law, instead of giving them a lien against the vessel, had by mere operation of law invested them with the absolute title to her. Clearly, in that case, as owners, their interest would be subject to the right and claim of the salvors. The interest of these respondents has been rescued from danger and risk of loss by the salvors, as truly as if their interest were a title to the vessel instead of being merely a lien upon it.

As to the claim for salvage, the facts were that the two colliding vessels had been together half an hour, and so far had been unable to separate themselves. They were about thirty-eight miles from Sandy Hook. The weather was bad, wind E. N. E. and blowing hard, with signs of its rising. The brig, when pulled away from the schooner, was so far crippled in her sails, spars and rigging, that it was doubtful if she could get back to port without help. She was wholly disabled from prosecuting her voyage. She was within about five miles then of the Jersey shore, which was of course a lee shore. Her starboard bow port, which was within three feet of the water line, was knocked out, and every time

The Remnants of the Brig Jeremiah.

she went down into the sea she shipped considerable water, but she did not leak otherwise and her pumps were in good order. An attempt of the crew to close up this hole had been unsuccessful. There was no other tug or vessel in sight at the time the agreement for towage was made. It is claimed by the libellants that the brig was in great danger of filling and going down on account of this injury to her bow, and that she would also have probably been unable to keep off the shore, towards which the wind and the currents were then setting her; that these dangers were increased by the symptoms of heavier easterly weather then observed. From these causes the brig was undoubtedly in some danger, but, I think, upon the testimony, her position was far from being so critical as the libellants claim. Her value, when she sailed on that voyage, had been about eight thousand dollars. After receiving repairs of trifling amount she sailed again for Cuba, and on her return was seized on a libel for seamen's wages and sold under a decree of this court for \$4,025. She had no cargo at the time of the collision. The tug was in the course of her usual employment; she encountered no risk or danger in the service rendered, unless indeed it was the risk of not being able to bring the vessel in at all, which, under the circumstances, cannot be considered a risk of any appreciable amount. The usual charge for towage by such a tug, in and about the harbor of New York, is shown to have been ten dollars an hour, and for towing vessels in from the sea there appears to be no settled rate. The master of the brig testified that they always got all they could. It is the duty of the court to moderate, according to the principles of fairness and justice, contracts thus made with parties in distress, if they appear to be extortionate. On all the evidence, I think five hundred dollars a full and fair compensation for the entire service rendered to the brig, giving full

The Remnants of the Brig Jeremiah.

force to all the evidence of the peril from which she was rescued and her value, and that the agreement to pay a thousand dollars was extorted from the master of the brig under stress of his necessities.

The claims of the various other libellants and petitioners are for services and supplies rendered and furnished to the brig on her credit after she was brought back to New York, where she was repaired, and from whence she sailed on another voyage before she was libelled for the collision or for salvage. The attempt to show that there is another fund, the freight, out of which they may be satisfied, was not successful. The surplus in the registry must be applied to the payment of these liens, amounting to about \$392, the salvage \$500, and the balance will go to satisfy the decree in favor of the owners of the schooner *P. A. Sanders*. As all these libellants and petitioners appeared by the same counsel and proctors, but one bill of costs will be taxed.

Decree accordingly.

For salvors and material men, *W. R. Beebe*.

For owners of schooner, *D. McMahon*.

The United States v. 117 Packages of Plug Tobacco.

MARCH, 1879.

THE UNITED STATES vs. 117 PACKAGES OF PLUG
TOBACCO.

NEW TRIAL.—VERDICT AGAINST EVIDENCE.—FORFEITURE FOR VIOLATION OF
INTERNAL REVENUE LAWS.

A verdict in favor of the defendant, in a suit for forfeiture of goods for violation of the Internal revenue laws, will not be set aside as against the evidence, though as to a small part of the goods proceeded against, the court entertains no doubt that upon the evidence the verdict is wrong.

CHOATE, J. In this case, which is a suit by information against 117 boxes of tobacco, the forfeiture of the goods is sought for on the grounds that the stamps on the boxes were old stamps used a second time, and also that the stamps were not cancelled by the Government die. The tobacco was manufactured in North Carolina, and consigned for sale to a commission merchant in New York, where it was seized. The jury have found a verdict for the defendant. The trial occupied three days. No exceptions were taken on the trial and the jury were out several hours. The plaintiff now moves for a new trial, on the ground that the verdict is against the weight of evidence. The evidence relied on by the Government was the appearance of the stamps themselves, and the opinions of experts, upon which it is claimed to have been demonstrated that the stamps were old stamps and also that they were not and could not have been cancelled by the Government die. On the part of the defence the claimant who manufactured and shipped the tobacco was called as a witness, and he swore positively that all the

The United States v. 117 Packages of Plug Tobacco.

the defendant. Within the meaning of the rules relating to new trials, I think an action of this character is clearly a penal action. And no precedent is cited which justifies the granting of this motion. On the contrary, it has been often held that the court will not disturb a verdict for the defendant, where there has been no misdirection, in an action where the effect of the verdict is to shield the defendant from a penalty. (*Peterson v. Etheridge*, 2 Clitty 273; *King v. Mann*, 4 M. & S. 337; *Brook v. Mitchell*, 10 East 268; *Brook v. Middleton*, 1 Camp. 450; *Comfort v. Johnson*, 10 Johns. 101; *Baker v. Richardson*, 1 Cow. 77; *Hall v. Green*, 24 Eng. L. & Eq. 453.) And especially where, as in this case, the Government might have made a stronger case by the production of evidence in its possession, and the value of the goods actually inculpatated is very trifling, and the cost and expense incurred by the claimant in defence of the action has been large, and he can in no event recover his costs, the impropriety of disturbing the verdict is obvious.

A motion is also made on the part of the plaintiff, for a certificate of probable cause. This is opposed on the part of the claimant. But I think it clear that the appearance of the stamps on these boxes was such as to justify the seizure, as one based on probable cause for forfeiture.

Motion for new trial denied.

Motion for certificate of probable cause granted.

For the United States, Assistant U. S. District Attorney
Edward B. Hill.

For claimant, *Thos. Harland.*

MARCH, 1879.

THE UNITED STATES vs. JAMES FRAZER.

RELICQUIDATION OF DUTY BY COLLECTOR.—LIMIT OF ONE YEAR UNDER STAT. 1874, CH. 391, § 21.

After the collector has liquidated the duty on imported goods, and the duty has been paid and the goods delivered to the importer, no part of the same nor any samples being retained by the collector, he has no power to make a reliquidation upon a subsequent report of an appraiser who never saw the goods.

The year, within which, under Stat. 1874, ch. 391, § 21, the collector can reliquidate the duty, runs from the time of the presentation to the collector of the "entry" by the importer, and not from the time of the first liquidation of the duty.

CHOATE, J. These were two actions to recover balances of duties alleged to be due upon goods imported by the defendant, by virtue of an alleged reliquidation of the duties by the collector. The collector having, upon the report of the appraiser, liquidated the duty, the goods were delivered to the defendant and the duty thus ascertained was paid, not even samples of the goods remaining in the possession of the collector. Afterwards another appraiser, who had never seen the goods nor samples of them, made another report, classifying the goods differently, whereby, if the new classification was correct, they would be subject to a higher rate of duty, and thereupon the collector made what is claimed to be a reliquidation of the duty, and on this reliquidation the suits are brought. In one of the cases this attempted reliquidation was more than one year after the entry of the goods, but less than a year after the first liquidation.

The United States v. James Frazer.

The plaintiffs now move for a new trial, on the ground of a misdirection in matter of law, verdicts having been ordered for the defendant.

Upon a careful review of the briefs of counsel and of the cases cited, I adhere to the opinion expressed upon the trial, that there is no power in the collector after the goods are delivered to the importer, and neither the goods nor any part of them, nor samples, are accessible for examination for the purpose of appraisement or classification, to reliquidate the duty upon the report of an appraiser who never examined the goods. I think the cases of *Westray v. United States*, 18 Wall. 322; *United States v. Cousinery*, 7 Ben. 252; *Iasigi v. The Collector*, 1 Wall. 375; *Watt v. United States*, 15 Bl. C. C. 29, do not sustain the proposition of the learned district attorney that the collector has any such power. The statutes 1874, ch. 391, § 21 (18 Stat. at Large 190), and 1875, ch. 136, § 1 (18 *id.* 469), appear to recognize some authority on the part of the collector to correct mistakes in the liquidation of duties, but neither statute nor decision of any court is cited which extends that authority to a case like the present, and the exercise of such a power might introduce into the customs revenue system intolerable abuses, and would be in itself most unreasonable.

Whatever power of reliquidation the collector has, it seems to me that the year within which the exercise of this authority is limited begins to run, not from the first liquidation, but from the date of the presentation to the collector by the importer of the "entry." The words "one year from the time of entry," in stat. 1874, ch. 391, § 21, cannot, in my judgment, be construed, either from reference to other parts of the Act or otherwise, as "one year from the time of liquidation." The language of the section shows clearly that the distinction between these two points of time was present to

The Steamboat Novelty.

The Schooner F. Merwin.

the minds of the legislators who framed this law, and the words used are too plain to call for construction by reference to extraneous considerations.

Motions for new trial denied.

For the United States, U. S. District Attorney *S. L. Woodford* and Assistant U. S. District Attorney *J. D. Jones*.

For defendant, *Nash & Holt*.

MARCH, 1879.

THE STEAMBOAT NOVELTY.

THE SCHOONER F. MERWIN.

COLLISION IN NEW YORK BAY.—STEAMER AND SCHOONER.—CHANGE OF COURSE *in Extremis*.—IMMATERIAL ALLEGATIONS.

A schooner and a steamboat came in collision in New York Bay in the day time. The wind was strong, about W. by S. The schooner was coming up the bay, heading up for the Narrows, and the steamboat was going down the bay to sea. The libel of the schooner alleged that while she was coming up the bay, heading about N., she discovered the steamboat about a quarter to half a mile off, she having been, till then, hidden from view by other vessels which were also coming up the bay; that the steamer, when seen, was a point or two on the schooner's starboard bow, heading about W. N. W., and backing her engines; that soon after the steamboat started ahead with a starboard wheel, on a course attempting to cross the schooner's bow, but so that a collision was inevitable; and that the schooner luffed to prevent the vessels from coming together head and head and was struck by the steamboat on her starboard side. The steamboat alleged that she, when going

The Steamboat Novelty.

The Schooner F. Merwin.

down the bay, and heading about S. by E., met several schooners coming up: that she was on the west side of the channel along by the West Bank, and that while the schooner was on her port bow, apparently about to pass on the port side of the steamboat as a schooner ahead of her had done, the schooner without cause luffed across her bows and thus caused the collision:

Held, That the turning points of the case were whether the schooner, at the time she luffed, had the steamboat on her port bow or on her starboard bow, and whether the luffing of the schooner contributed to produce the collision; That, on the evidence, the schooner had the steamboat on her starboard bow; That the allegations of the schooner, as to the steamboat's heading to W. N. W. and backing, and going ahead again and coming into the schooner on a starboard wheel, were not proved, but were immaterial allegations inasmuch as it was not claimed that the schooner did anything wrong before she luffed; That, on the evidence, it appeared that the course of the steamboat was on a line eastward of that of the schooner: and that her pilot, in endeavoring to get to the westward of the schooner, crossed her bows and undertook this manœuvre when there was not time and distance for him to perform it; That, on the evidence, the luffing of the schooner was a movement *in extremis* not contributing to produce the collision, and that the steamboat was solely liable for the collision.

CHOATE, J. These are cross libels, brought to recover damages caused by a collision between the steamboat Novelty and the schooner F. Merwin in the lower bay of New York, shortly before noon on the 28th of December, 1876. The Merwin was a three-masted schooner of about 340 tons, and was bound from Georgetown, D. C., to New York, with a load of coal. Her length was about 170 feet over all. The Novelty was a side-wheel steamboat, and was bound from Clifton Landing, Staten Island, to St. Johns, Florida. The length of the steamer was 216 feet. She was going out light, having on board about 100 tons of coal. The place of the collision was between Craven shoal and the west bank. The wind was about W. by S. a strong breeze. The day was remarkably clear and pleasant.

The case, as stated in the libel of the schooner, is that she was heading north up for the Narrows and going about nine knots an hour; that while in this position, she discovered the Novelty off from one to two points on her starboard bow and at a distance of from a quarter to half of a mile, heading about west-north-west and backing her engines; that other vessels coming up the bay had been between the schooner and the steamboat, covering the steamboat so that she could not be seen from the schooner, and when the obstructions passed away the steamboat was discovered in the position above stated and backing her engines; that soon afterwards the schooner noticed that the steamboat had stopped backing her engines and was moving them forward and making some progress through the water and making such a course as would take her directly across the bows of the schooner, and that if both vessels continued their courses a collision was inevitable; that the steamboat did not change her course, and thereupon the schooner, when at a distance of about two hundred yards from said steamboat, put her helm hard down and luffed up to a westerly course; that the steamboat sheered further to the westward and southward and following the curve made by the schooner, though at the northward of it, and at this time being under full headway, she ran into the schooner, striking her on the starboard side just forward of the main chains, breaking the rail and seven of her bulwark stanchions, etc.; that the collision was caused by the mismanagement of the steamboat in starting ahead and keeping her course directly across the bow of the schooner and so that she would have been run over by the schooner, had not the latter changed her course, and in keeping under full headway and without porting her helm as she should have done, but, on the contrary, sheering on to the course of the schooner, and so continuing until the collision

The Steamboat Novelty.The Schooner F. Merwin.

occurred, and in not having a competent lookout properly stationed.

The case of the steamboat, as stated in her libel, is that she took her course outward, going at about seven miles per hour, keeping close in to Fort Wadsworth, and, after passing Fort Tompkins on Staten Island, hauled down to a course south one-half west, hauling close in towards the west bank and following the course of the steamer Dictator, which was about six hundred yards ahead and bound on the same voyage; that ample room was thus left for vessels to pass up or down on the port side of the steamboat; that at this time the Merwin, having the wind on her port side and about five points abaft the beam, and having her lower sails and one topsail set and going with the speed of about twelve miles an hour, was approaching on the port bow of the Novelty, being then about 600 yards ahead and 200 yards to leeward of her, and steering about N. by E. or half E. as if she was intending to pass the Novelty on her port side, as two other schooners were then also doing, and, in order to give her more room, the Novelty, putting her own wheel hard to port, hauled still further in to the west shore, heading inside of the upper buoy on the west bank below Fort Tompkins, and giving the schooner thereby the amplest room to pass the steamer on her port side; that suddenly, when about 100 yards ahead of the steamer, and without any apparent reason, the schooner put her helm hard to starboard, swinging to a course across the bows of the steamer about north northwest; thereupon immediately the steamer stopped and backed with all her force, but notwithstanding this the schooner struck the steamer a violent glancing blow on the port bow, knocking her stem and bow out; that the collision was caused wholly by the fault of the schooner, in suddenly and without reason changing her course so as to cross the bows

The Steamboat Novelty.The Schooner F. Merwin.

of the steamer and when it was too late by any act on the part of the steamer to prevent the collision.

The evidence shows that there were four schooners standing up the bay for the Narrows at and just before the collision. They were nearly in a line. The Eva Bell was the foremost; she was about a quarter of a mile ahead of the Merwin. Then followed the Merwin. Astern of the Merwin, about a quarter of a mile, was the Georgia, and from half to three-quarters of a mile astern of the Georgia was the Kirk. The Dictator and the Novelty met this line of schooners as they went down the bay. The general position of this line of schooners was along the west bank and they were steering about north. I think that the testimony leaves no doubt whatever, that the Merwin was steering very nearly north; that she shaped her course for a point just clear of the bluff on the Staten Island side of the Narrows, and that she was running very near the west bank. This is not only shown by the testimony of those on board of her, but also by the evidence of those on the Georgia and the Kirk immediately astern of her and running for the same point. These parties had opportunity as well as motive in noticing the course she was making. It was also her proper course and there was no reason why she should deviate from it. She was outsailing the other schooners, had passed the Kirk and the Georgia, and was gaining on the Eva Bell. Her speed upon the proofs was nine miles an hour. She had all her lower sails set.

Up to the time that the Merwin luffed, which is charged against her as a fault and which manœuvre she admits and attempts to justify, it is clear that she was not at fault, and that the steamer was bound to keep out of her way. The pleadings and the proofs present but two questions, (1), what were the relative positions and courses of the schooner

The Steamboat Novelty.The Schooner F. Merwin.

and the steamer when the schooner luffed, and (2) was the luffing of the schooner a fault which caused or contributed to the collision, or was it done when the collision had already become inevitable, and under circumstances justifying the movement.

It is the claim of the schooner that when she luffed, the steamer was approaching her upon her starboard bow, upon a course crossing the bows of the schooner, and so as to make a collision inevitable if both vessels kept on their respective courses, and that to avoid cutting the steamer down, as she must have done if she kept on her course, and to lighten the blow, she put her wheel hard down and came up in the wind; that this was the only movement she could make with any chance of safety to herself and the steamer; that if she had attempted to keep off, instead of luffing, she could not have kept off in time, but would inevitably have run over the steamer.

It is the claim of the steamer that when the schooner luffed there was not the slightest danger of a collision; that the vessels were approaching on courses very nearly parallel, the steamer being on the schooner's port bow and well to windward of the course of the schooner; that, to make all sure, the steamer ported, taking her still further away from the schooner's course; that then, suddenly and without reason, the schooner luffed across the steamer's bows when it was too late to do any thing to prevent the collision which this luffing and nothing else made inevitable. It is evident that it is a material and necessary part of the steamer's case that when the schooner luffed the steamer was not on her starboard bow. [The court, having discussed at length the evidence of the witnesses from the several vessels on this point, then proceeded as follows:] Upon the whole testimony, I think it is clearly made out that the vessels were in the rela-

The Steamboat Novelty.The Schooner F. Merwin.

tive positions testified to by those on the Merwin at the time the master of the Merwin ordered the wheel hard down; that they were brought into this position wholly by the fault of the pilot of the Novelty in attempting to go to windward of the Merwin when he was unable to execute the manoeuvre. It seems probable that he miscalculated the speed of the Merwin, and although he put his wheel hard-a-port, it was too late for him to cross her bows in safety.

Great stress is laid by the counsel for the steamer on what is claimed to be the fact, that the steamer was not at any time heading north of west up by the mouth of the Narrows and backing, nor coming round upon the course of the Merwin on a starboard helm, nor at any time covered by the Eva Bell from the sight of those on board the Merwin:—and that the Eva Bell did not keep off to avoid the Novelty, all of which are alleged in the libel of the schooner and testified to by Capt. Pearce, as what appeared to him to be facts as to the movements and course of the Novelty. I think it is established by the testimony of the engineer of the Novelty and by the other testimony, that she did not reverse her engines till the four bells were rung just before the collision, and also by the preponderance of the evidence that she was not heading north of west after passing the Eva Bell and before the collision, and that she approached the Merwin on a port and not on a starboard wheel after passing the Eva Bell; and on these points, therefore, Capt. Pearce must be held to be mistaken. These circumstances are, however, not in themselves important, except as they may affect the credibility or accuracy of observation of Capt. Pearce. It is of no consequence *how* the Novelty got into the dangerous position and proximity in respect to the Merwin which she was in when Capt. Pearce gave the order to luff. The schooner having steadily kept on her course till that moment, it was

The Steamboat Novelty.The Schooner F. Merwin.

the fault of the Novelty that she got there *in any way by her own movements*. And enough of the averments of the libel of the schooner are clearly proved to sustain her case and throw the responsibility of that position of the two vessels on the Novelty at that point of time. Whether Capt. Pearce's mistakes, noticed above, are owing to misrecollection of the incidents preceding that position of danger in which he found himself, or to carelessness of observation, is immaterial. Up to that time he had committed no fault, as is conceded. On the principal fact testified to by him of the position and general course of the steamer when he ordered his wheel hard down, he is fully sustained by other testimony of the strongest character, and these mistakes, if they are wholly such, cannot, in my opinion, be taken to impair his credibility or to call in question the reality of what he testifies was the state of facts when he gave this order to his wheelsman. Indeed, there cannot be the slightest doubt that it was a position of real danger that called forth the startling cry of Capt. Pearce, "What is that steamer doing?" etc., "Hard down your wheel!" The tone in which it was uttered startled the two men and the boy who were below and brought them instantly on deck, one of them almost naked and without waiting to put on his clothes. And yet, if the story of Hoffmann, the pilot of the steamer, is true, there was not the slightest appearance of danger from the deck of the Merwin. The Novelty was passing her safely on the port side and keeping still further off. Hoffman's story does not in any way account for the alarm on the schooner, or for her luffing. His story is, on this ground, therefore, improbable in itself as well as unsustained by the testimony of witnesses.

In respect to the course of the Novelty from the time she passed Fort Tompkins till the moment the Merwin luffed, since we must reject as unworthy of credit the testimony of

The Steamboat Novelty.The Schooner F. Merwin.

her pilot, and her lookout, if she had one, is not called, we have not sufficiently definite proof to determine whether the Eva Bell may not have at one time covered her from the sight of the Merwin; that she made a course considerably to the eastward of that of the Merwin is certain; that she was so far to the eastward that she was obliged to port in order to pass the Eva Bell, is, I think, also proved. Capt. Pearce may well have mistaken the change of course made by the Eva Bell to the eastward when about opposite the hospital on the west bank, for a movement of keeping off to pass the Novelty. It may be that he did not notice the Novelty till she passed the Eva Bell and then seeing her supposed she was uncovered by the Eva Bell, but this is a point of no importance.

The only remaining question is whether the luffing of the schooner contributed to bring about the collision. Some of the witnesses from the other vessels think that if she had kept her course she would have cleared the steamer. It was the judgment of her master, formed instantly, it is true, and without time for deliberation, that this was the only movement that afforded any chance of avoiding or easing off the blow that seemed inevitable; that if he kept his course the two vessels would come together head and head; if he ported and endeavored to keep off, with his vessel loaded as she was, and with the wind and her sails as they were, he could not keep her off quickly enough to clear the steamer, but would have cut her down and probably sunk both vessels. No doubt a sailing vessel which changes her course when meeting a steamer must justify her change of course, but where the change is made in a position of extreme peril, brought about by the action of the steamer herself, some weight is to be given to the judgment, formed on the instant, of those in command of the sailing vessel. Much depends, of

Foras Hava, &c.

course, on the evidence as to the extremity of the peril. It is a question of distances, relative courses and speed, and the probable effect of keeping on and of possible changes of course. Upon the whole, I think the schooner has made out a case on this point upon the testimony, and that the position of the vessels was such as justified her in luffing in order to prevent the great damage which the movements of the steamer then apparently made inevitable; that her luffing did not cause nor contribute to bring about a collision, but prevented greater loss and damage than would otherwise have resulted from the fault of the steamer.

The libel of the Newark Transportation Co. against the *Merwin* dismissed with costs.

Decree for libellants against the *Novelty*, with costs, and a reference to compute the damages.

For the *Merwin*, *R. H. Huntley*,

For the *Novelty*, *W. R. Darling*.

MARCH, 1879.

FOURTEEN HORSES, ETC.

FREIGHT. LARK.—CHARTER.—CARGO.—PRACTICE.

A vessel was chartered to go from New York to ports in the West Indies and back to New York. The charter was expressed to be for the purpose of carrying a circus company and their necessary tents, clothing, horses, etc. It provided for the payment of charter money at the end of each month and

Fourteen Horses, etc.

it bound the vessel "and the merchandise laden on board" to the performance of the charter.

On the return of the vessel, while she was at Flushing, L. I., and before she was towed to her pier in New York, and before any of her cargo was discharged, the owner of the vessel filed a libel to recover a balance of charter money due and attached the horses and paraphernalia of the circus company on board. The charterer excepted to the libel:

Held, That the property attached was *cargo*, on which the lien for charter money was given by the charter;

That the clause in the charter making the charter money payable by instalments, at a place where the vessel would not probably be when the time of payment arrived, did not destroy the lien on cargo given by the charter;

That the failure to pay the monthly instalments due before the filing of the libel was a breach of the charter, and the owner of the vessel had a lien on the cargo for his security;

That the libel was not prematurely filed, and the libellant was entitled to recover.

CHOATE, J. This is a libel against the cargo of the schooner John N. Colby for freight, etc., alleged to be due under a charter party. The charter party was made in New York, on the 27th of October, 1876, between the libellant as master and agent of the owners and one Murray. By its terms the libellant agreed on the freighting and chartering of the vessel to Murray, for a voyage from New York to such safe ports and places as charterer may direct, including the West Indies and South America and back to New York, for a term of at least three months, with privilege to keep the vessel three months longer, the owner to furnish crew and provisions, the whole of the vessel, except the captain's and mates' room and necessary accommodations for the crew and for the tackles, sails and provisions of the vessel to be at the sole use of the charterer, the owner to take on board during the voyage "all such lawful goods and merchandize as the charterer or his agent may think proper to ship," the charterer to pay to the owner or his agent "freight at the

Fourteen Horses, etc.

rate of \$690 per month and pro rata for parts of a month earned and due at the termination of each month, payable \$500 to Evans, Ball & Co. upon the presentation of order of charterer, and \$190 to the captain," "the charterer to pay all port charges, both foreign and domestic, including loading, discharging, consul fees, etc." The charter contained the following clauses: "It is understood that the vessel is chartered for the purpose of transporting a circus company and their necessary tents, clothing, horses, etc." "It is hereby understood that the monthly payments under this charter are to commence November 6th, 1876." "To the true performance of the foregoing agreements the said parties do hereby bind themselves, their heirs, executors, administrators and assigns, and also the said vessel, her freight and appurtenances and the merchandize laden on board, each to the other in the penal sum of the estimated amount of charter."

Under this charter, the vessel took on board at New York, on the 6th of November, the circus company, its horses, tents, and other equipments, and proceeded under the direction of the charterer to various ports in the West Indies, and arrived at New York on her return on the 3d of April, 1877. During this time the vessel was at sea, going from port to port, seventy days; the rest of the time was spent in various ports where the circus was landed and gave public performances.

This libel is brought by the owner of the vessel, claiming a balance of freight money and port charges paid. The libel was filed April 3d, 1877, while the vessel was lying at Flushing, L. I., and before she was towed to her pier in New York, and before any of the cargo was discharged. The property seized by the marshal was also seized on board the vessel and before it was discharged. The libel avers that

The United States v. Frederick D. Tappan *et al.*

of the tax by executors and trustees, that the very absence of any similar provisions in the sections which follow, and which regulate the succession tax, strongly support the defendants' claim as to the true construction of those sections.

Upon a consideration of the whole statute, it is, I think, free from doubt that the tax is payable by the successor himself, and not by his trustee, if he have one. In the present case it is claimed that under the statute law of New York these executors took no title as trustees, but only powers in trust. But the revenue laws of the United States were not drawn with any reference to nice distinctions in the State laws of this character, and it can hardly be claimed that if the intent of the statute was to make a trustee liable for the tax, he would be chargeable in one State where, by the local law, he was held to take a title in trust, and not chargeable under the same will in another State by whose local law he was held to be vested merely with a power in trust. The defendants' demurrer is sustained independently of any such distinction.

Judgment for defendants on demurrer.

For defendants, *Davies, Work & McNamee.*

For the United States, Assistant District Attorney *E. B. Hill.*

FEBRUARY, 1879.

MICHAEL GALLAGHER ET AL. vs. D. COLDEN MUR-
RAY ET AL.

MICHAEL CONDON vs. THE SAME.

SEAMEN'S WAGES.—CONDEMNATION OF VESSEL.—EXTRA WAGES FOR DE-
LAY IN PAYMENT.

A steamer left New York on a voyage to Nassau, N. P., thence to Cuba and back to New York. Just before reaching Nassau she struck a rock and was so injured that, after she reached Nassau, a survey was called on the application of her master, and the surveyors recommended that she be condemned as unseaworthy, and thereafter the owners abandoned her to the underwriters. After the survey the master discharged the crew and offered them a passage to New York. Seventeen of them accepted the offer and came home to New York. The other eight refused the offer, claiming that the ship could be brought home; and they remained at Nassau for more than a month, during which time the master allowed them to sleep on board and he provided food for them. On the arrival of the seventeen at New York they claimed to be paid wages up to the time of their arrival besides three months' extra pay. The owners of the steamer refused to pay wages after the day when she was injured. The other eight, after their return to New York, made a similar claim, and suits were brought against the owners to recover the wages:

Held, That, by the proceedings taken as to the vessel, she was "condemned" as mentioned in section 4582 of the United States Rev. Stat. and the sailors therefore were not entitled to the three months' extra pay;

That the sailors were entitled to be paid up to the time of their discharge by the master in Nassau, and no later;

That the seventeen were entitled to the ten days' extra pay provided by section 4529, because there was no sufficient cause for the delay in payment;

That the act of the master at Nassau, in allowing them to sleep on board, and furnishing food for them after their discharge, did not entitle them to claim wages after such discharge.

Gallagher *et al.* v. Murray *et al.*Condon v. The same.

CHOATE, J. These are suits *in personam* for seamen's wages, brought against the defendants, the owners of the steamship Cleopatra.

The Cleopatra left New York October 17, 1878, bound on a voyage to Nassau, N. P., and thence to a port or ports in Cuba and thence back to New York. Just before reaching Nassau she struck upon a rock and was injured, and most of her cargo and passengers were forwarded by other vessels. She then proceeded to the port of Nassau, where she has ever since remained. The accident happened on the 23d of October, and she got into port about seven days later. The crew were kept by the ship till December 11th, discharging their ordinary duties, such as there were for them to do in port. Meanwhile a survey was called on the application of the master. It was composed of the captain of the port and the agent of American underwriters, and they called in to their assistance an engineer and a ship carpenter. They made a written report to the effect that one of the boilers was thrown out of place, the keel was injured, bolts started, and that the vessel was badly hogged, and unseaworthy; and recommended that, in consequence of her machinery being thoroughly disabled and of there being no facilities for repairing her there, she be condemned. Afterwards, on December 18th, the owners in New York wrote a letter of abandonment to the underwriters. The evidence now produced sustains the case found by the survey, and shows that she had suffered such injuries by reason of sea perils that she was wholly unfit to continue her voyage, and that she could not be repaired so as to complete her voyage. On the 11th of December the master, by direction of the owners, called the crew together, and informed them that they were discharged, and offered them a passage home to New York in another steamer of the same owners. Seventeen of them, being the

Gallagher *et al.* v. Murray *et al.*Condon v. The same.

libellants in the first of these suits, accepted the offer and came home in the other steamer. The other eight refused to come home; took the ground that the ship could continue the voyage or be brought home, and remained at Nassau till about the 25th of January. The master permitted them to sleep on board and he provided board for them at Nassau. The libellants in the first suit now demand wages up to the time of their arrival at New York on the 11th of December, with three months' extra pay, on the ground that they were discharged at Nassau with their consent, and that the vessel was neither wrecked, stranded nor condemned as unfit for service. They rely on Rev. Stat. § 4582, which provides that the three months' extra wages due to seamen so discharged, shall not be required "where vessels are wrecked or stranded or condemned as unfit for service," but shall in no other case be remitted. It is claimed that "condemned" here means condemned by decree of an admiralty court. But considering the purpose of the statute, I cannot think the word was used in this restricted sense. Wreck, stranding or other fatal disability to the ship is recognized as discharging the contract between the ship and the seamen; but for the security of the seamen against possible imposition, it is required that where the case is not one of self-evident wreck or stranding, the proof of disability shall be shown by the condemnation of the vessel as unfit for service. The reference here is to that proceeding known in all ports, by which ships which have suffered disaster are condemned or pronounced unfit for service, the common method being by the report of a survey called by the consul of the nation to which the ship belongs, upon the application of the master. To give the words the restricted sense contended for by the libellants, would, in many ports and places, make performance of the condition impossible. In this case there was such a con-

Gallagher *et al.* v. Murray *et al.*Condon v. The same.

demnation, and the claim for three months' extra pay is disallowed. As the master kept the crew on duty till December 11th, they are clearly entitled to their wages till that time. (*Tarlton v. Mullory, ante*, p. 46.) These seamen further claim that their wages should be paid up to the time of their arrival in New York. For this claim there seems to be authority in the case of *The Elizabeth*, 2 Dodson 411. But I think this is a case where the service of the seamen was terminated by reason of the wreck or loss of the vessel, within the meaning of Rev. Stat. § 4526, and therefore they cannot claim their wages after the day of their discharge, December 11th. When the seamen were informed that their services would not further be required, they were told that they would be paid in New York on their arrival. When they arrived a dispute arose as to the amount due, the owners claiming that the wages were due only up to the 23d of October, and the seamen insisting on being paid up to the time of their return. Rev. Stat. § 4529, imposes on the owner a penalty of two days' extra pay for every day not exceeding ten during which the payment of wages is delayed beyond the period when by law it is payable, provided the delay be without sufficient cause. I cannot think that there was sufficient cause in this case for the delay in payment. The only question which could be looked upon as doubtful was whether the wages should cease on the 11th of December or on the 17th, and if this had been the only difference it may well be supposed that it could have easily been adjusted. But the owners having made a wholly unreasonable claim, and thereby kept the crew waiting for their wages, I think they are chargeable with the twenty days' extra pay.

As to the seamen who stayed in Nassau, nothing which the captain did in sheltering and feeding them can be construed as a revocation of the discharge, as is claimed by the

The Ship Shand.

libellants. It was an act of humanity, for which the ship owner should not suffer. As these men refused the discharge and the offer of return to New York and put the master and the owners to unnecessary expense, there is no reason why their wages should be paid beyond the 11th of December, when they were discharged in consequence of the voyage being hopelessly broken up.

Decree for libellants with costs and reference to compute the amount.

For libellants, *H. Heath*.

For respondents, *J. Sherwood*.

FEBRUARY, 1879.

THE SHIP SHAND.

DAMAGE TO CARGO.—PERIL OF THE SEA.—NEGLIGENCE.—BURDEN OF PROOF.—DUTY OF MASTER.

A ship took on board at Manila a large quantity of mats of sugar, to be brought to New York, under bills of lading containing the usual exception of perils of the sea. On the voyage she met with heavy weather and sprung a leak so that, after having jettisoned a part of her cargo, she arrived at her dock with ten feet of water in her hold, her crew having become so worn out by labor that after she had passed quarantine a gang of fresh men was sent to her, who were, however, able to control the leak with the ship's pumps. The consignees of the ship at once agreed with the owner of a steam pump and the pump was put on board the ship, and by the next morning the water in the ship had been pumped down as far as

The Ship Shand.

the suction pipe of the steam pump reached, which was just about at the bottom of the sugar. During the following day, the pump, which was in charge of an engineer and fireman employed by its owner, was worked at intervals as the water rose high enough to reach the suction pipe. The discharge of the cargo had been commenced and continued during that day. During the following night, none of the ship's officers or crew being on duty, the steam pump stopped working, and the water again flooded the lower hold where the sugar was stowed. The consignees of the sugar filed a libel against the ship, claiming to recover damages for a failure to deliver the sugar in like good order as when received, as she had contracted in the bills of lading to do; and the owners of the ship set up as a defence that the damage was occasioned by peril of the sea:

Held, That, the leak being shown to have been a peril of the sea, the ship had made out her defence as to the cargo jettisoned, and as to the sugar washed out by the leak and the injury caused by the leak to that which remained, up till the time when the water was first pumped out of the ship by the steam pump;

That the duty of the ship, on arriving at the dock, was to use whatever extraordinary means were accessible to prevent further injury to the cargo; and that the employment of the steam pump was an act of the master, in performance of that duty, and not an act of the master as agent of the cargo in extraordinary peril;

That the persons working the steam pump were therefore the agents of the ship and not agents of the owners of the cargo;

That the ship, therefore, was responsible for the proper performance of duty by those in charge of the steam pump;

That, although the original leak was a peril of the sea, the owners of the cargo, having shown that the leak could have been controlled by the use of means which were available, and that such leak had not been controlled, had made out a case of negligence on the part of the ship;

That the ship, having failed to give any explanation of the stoppage of the steam pump on the night in question, was liable to the owners of the cargo for all the loss and damage to the cargo which arose from the flooding of the ship on that night;

That the ship was liable for all the loss of sugar occasioned by the suction pipe being so short that the water must rise on the cargo in order to be within reach of the pump.

CHOATE, J. This is a libel by The Donner & De Castro Sugar Refining Company, the owners of part of the cargo of

The Ship Shand.

the ship Shand, against the ship and her owners, to recover damages on account of her failure to deliver her cargo in good order and condition, pursuant to the stipulations of her bills of lading. She shipped at Manila, among other goods, 34,742 mats of sugar, weighing about 2,430,940 pounds, and sailed from that port for New York on the 1st day of August, 1876. The sugar was stowed in the lower hold and properly stowed, and dunnaged. It was shipped under bills of lading which acknowledged its receipt in good order and condition, and stipulated for its delivery in New York in like good order and condition, "all and every the dangers and accidents of the seas and navigation of whatsoever kind excepted." The ship delivered in New York only 31,663 mats weighing about 1,008,865 pounds. As to the 3,079 mats not delivered it appeared that they were jettisoned at sea; and the loss of weight in the mats that were delivered was about 1,206,545 pounds. And for this failure to deliver and this loss of weight the suit is brought. The libel charges "that the said ship and her owners have failed to keep and perform the contracts in said bills of lading contained or to deliver the said sugars in conformity therewith; but on the contrary, by reason of carelessness and negligence on the part of said ship and her owners, and their servants or agents, a large part of said sugars were totally lost and a large portion of the remainder delivered in a damaged condition." The answer alleges that part of the sugar was necessarily jettisoned to save the ship and cargo and the lives of those on board, and that all the sugar which was lost or destroyed or jettisoned or which was not delivered was lost, destroyed or not delivered solely from the causes excepted in the bills of lading, and not from any fault, negligence or carelessness on the part of the ship and her owners, or their servants or agents. The answer further al-

MARCH, 1879.

THE BARK T. F. WHITON.

WAGES.—SETTING OFF DAMAGES.—STATEMENT MADE BEFORE SHIPPING
COMMISSIONER.—EVIDENCE.

A second mate of a vessel filed a libel against her, to recover \$91.75, for wages. The amount of his wages was admitted, but the owners of the ship set up as an offset, that he had wrongfully assaulted one of the sailors on the voyage, to the damage of the ship of \$120. The assault and the damage were proved. But the libellant urged that as the deduction was not claimed in the statement of wages made by the master to the shipping commissioner, nor entered in the log, the defence could not be made :

Held, That as the log was not produced, the presumption was that the entry was not made in the log ;

That under §§ 4550, 4596 and 4597, the court has a discretion to reject the evidence offered, but that this does not prevent proof being given of the facts, and that as the facts were proved beyond dispute, the owners were entitled to the set-off, and the libel must be dismissed.

CHOATE, J. This is a suit *in rem* for wages of the libellant, as second mate, on a voyage from Philadelphia to Venice, thence to Trieste, and thence to New York. She arrived at New York December 15th, 1878, and it is admitted that there was a balance of libellant's wages to that time unpaid, amounting to \$91.75. Among other defences set up in the answer, it is averred that "during the voyage and on or about the 26th day of August, 1878, when said vessel lay outside of the port of Venice, the libellant, who was the acting master of the said bark, committed a most violent and unprovoked assault and battery upon James Blake, the steward of said bark ; that by reason of said assault and battery, said Blake was very severely injured, and was in

The Bark T. F. Whiton.

danger of losing his life, and was unable to do his duty on board, whereby said bark and these claimants suffered damage in the sum of \$120," which claimants ask to have deducted from any wages found due. That such an act on the part of a seaman, whereby the vessel suffers damage or is put to expense, is to be considered in diminution of a claim for wages, has been often held. (*Scott v. Russell*, Abb. Adm. 258; *The Neptune*, Gilpin 89; *The Tuskar*, 1 Sprague 71.) The fact of the assault was clearly proved, and the evidence shows that in the sums paid for medical service to the steward, and loss of his services, the ship has sustained damage exceeding the balance of libellant's wages.

It is, however, insisted that as this deduction was not claimed in the statement of the wages of the crew, made by the master to the shipping commissioner, at the end of the voyage, nor entered in the log, under Rev. Stat. § 4550, the claimants cannot make this defence. I think, however, that the provisions of this section were not designed to prevent and do not prevent the court in a suit for wages from adjudicating upon the amount due, according to the facts proven. Sections 4596 and 4597 show that the failure to enter facts in the log on which deduction of wages is claimed, does not absolutely prevent proof of those facts, but gives the court a discretion to reject the evidence. No doubt the general purpose of these provisions of law is such as libellant's counsel suggests, to prevent the oppression of seamen by trumping up unfounded claims of misconduct, and ordinarily, and if the facts are left in doubt, the failure to enter the facts in the log should defeat the attempted defence. But in this case, the proof of misconduct is the positive and repeated admissions of the libellant himself, and the proof of damage is clear and not contradicted. The log was not produced. The vessel was at sea with the log at the

The United States *v.* Four Cases of Lastings.

time of trial. I think the libellant's counsel is correct ; that the presumption is as against the claimants ; that the prescribed entry was not made in the log.

As there is nothing due the libellant, it is unnecessary to consider the other defences set up by the claimants.

Libel dismissed, with costs.

For libellant, *Louis F. Post.*

For claimants, *Benedict, Taft & Benedict.*

MARCH, 1879.

THE UNITED STATES *vs.* FOUR CASES OF
LASTINGS.

FALSE INVOICES.—FORFEITURE.—BONA FIDE PURCHASER.—REVISED STATUTES, SECTIONS 2864 AND 13.

The Act of March 3d, 1863, ch. 76 § 1, (12 Stat. at Large, p. 738), provided that in case of the knowingly entering goods by means of a false invoice, etc., the goods or the value thereof should be forfeited. In embodying this statute in the Revised Statutes § 2864, the words "or the value thereof" were omitted, and the Act of 1863 was repealed. By the Act of 1875, ch. 80 (18 id. p. 319), passed February 18, 1875, section 2864 was amended by restoring the words "or the value thereof." After the passage of the Revised Statutes but before the passage of the amending Act of 1875, certain goods were knowingly entered by means of false invoices:

Held, That, under the statute in force at the time of the entry, the forfeiture of the goods was absolute, and that it was not a case of a forfeiture of the goods or of their value at the election of the United States, and therefore a transfer for value to a *bona fide* purchaser or pledgee before suit brought gave no title as against the United States;

The United States v. Four Cases of Lastings.

of the forfeiture declared for this particular illegal act is not an absolute forfeiture vesting the title at once in the United States, but a forfeiture at the election of the United States, not taking effect so as to vest the title till by seizure or suit brought that election is made. (*Caldwell v. The United States*, 8 How. 366.) Under this later statute the intervening title of a third party acquired in good faith and without notice is protected. (*Caldwell v. United States, ut supra.*)

In this case the goods before the seizure had passed into the possession of the claimants, Field, Morris, Fenner & Co., auctioneers, who had made advances thereon to the consignee, and their good faith and entire want of notice of the illegal acts were not contested.

The court was asked to instruct the jury that "if they believed that the claimants came into possession of the goods *bona fide* and without notice of any fraud on the Government, the Government cannot claim a forfeiture of the goods under section 2839 or 2864 of the statute after said goods came into the possession of the claimants." It is for alleged error in refusing this instruction that the motion for a new trial is made.

It is insisted by the learned counsel for the claimants that the Act of 1875 repealed section 2864 of the Revised Statutes, substituting a new and different provision of law in its place, and that the repeal of a law imposing a penalty or forfeiture, even though the forfeiture is declared absolutely by the law repealed, takes away all remedy to enforce such forfeiture, unless the repealing act expressly saves the right to enforce such forfeiture accruing under the repealed statute.

This familiar principle, as applied to the repeal of criminal and strictly penal statutes, has been also held applicable to statutes imposing forfeitures of the nature of that declared by the customs laws. (*The Schooner Rachel v. United States*,

The United States v. Two Trunks containing Wearing Apparel.

6 Cranch. 329; *Yenton v. United States*, 5 Cranch. 281. See also *Hartung v. The People*, 22 N. Y. 95; *United States v. Passmore*, 4 Dall. 372.)

It is true that the Act of 1875 contained no saving clause, and it may well be held to have operated as a repeal of section 2864 within the meaning of this rule; but it was subject to the provisions of section 13 of the Revised Statutes, which is as follows; "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Motion denied.

For the United States, *George Bliss*.

For claimants, *James M. Smith*.

MARCH, 1879.

THE UNITED STATES vs. TWO TRUNKS CONTAIN-
ING WEARING APPAREL.

JUDGMENT AGAINST STIPULATORS IN CASE OF FORFEITURE.—DEFENCES BY
STIPULATORS.

Certain goods having been proceeded against as smuggled, the owner appeared as claimant and gave stipulation for value in a sum agreed upon between the claimant and the district attorney. Afterwards a final decree was en-

The United States v. Two Trunks containing Wearing Apparel.

tered against the claimant on default. On return of the order to show cause against the stipulators why execution should not issue against them for the amount of the stipulation :

Held, That they were not entitled to a reduction of the amount of the stipulation on the ground that the claimant after the giving of the stipulation and before the delivery of the goods to her had paid the duties, and that the amount of the stipulation was for the estimated foreign value of the goods with the duty added ; nor on the ground that while the goods were under seizure, and before the stipulation was given, they were injured by being carelessly handled by persons in the employ of the collector and by visitors who, by their consent, had access to them, and that the stipulation was given for a larger amount than the true value of the goods at the time it was given.

CHOATE, J. In this case the goods were proceeded against as smuggled goods, being landed without a permit in the personal baggage of the owner. The seizure was on the 11th of March, 1878. On the 9th of April, 1878, the claimant, with sureties, executed a stipulation for value in the sum of \$3,600. The agreement as to the value of the goods for the purpose of bonding them was doubtless designed to be, and was, a substitute for the appraisement provided for in such cases by section 938 of the Revised Statutes. The stipulation is in the usual form, and its condition is that "if the stipulators undersigned shall at any time upon the interlocutory or final order or decree of the said District Court, or of any appellate court to which the above named suit may proceed, and upon notice of such order or decree to Foster and Adams, Esquires, proctors for the claimant of said property, abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue." And the agreement of the stipulation is, "The parties hereto hereby consenting and agreeing that in case of default or contumacy on

The United States v. Two Trunks containing Wearing Apparel.

the part of the claimant or her sureties, execution for the above amount (\$3,600) may issue against their lands, chattels and goods."

A final decree went against the claimant by default for want of an answer, July 30th, 1878, for the amount of the stipulation. By the rules and practice of the court, notice of four days is, after the entry of the final decree, given to the stipulators to show cause why execution should not issue against them. On the return day of this order to show cause the stipulators appeared to show cause why execution should not issue for the amount of said decree, and made proof by affidavit, that after the giving of the stipulation and before delivery of the goods to the claimant, she paid the duties on the goods; that the agreed valuation of the goods (\$3,600) for which the stipulation was given was based on an estimate of their foreign value with the duties added thereto; also, that while the goods were under seizure and before the stipulation was given, they were injured by being handled carelessly by persons in the employ of the collector and by visitors who were admitted by them to the seizure room to examine them; that the stipulation was given for a larger amount than the goods were really worth when this valuation was put upon them, that valuation making no allowance for this injury. The stipulators ask that the amount of the decree be reduced as to them by the amount of the duties paid, and by the amount of this depreciation caused by the carelessness or improper conduct of the Government officers.

Assuming that the facts are as claimed by the stipulators, they are not entitled to relief in this proceeding.

As to the claim for depreciation and injury, it has been held that the stipulation which the United States is entitled to, on delivery of the goods to the claimant, is a stipulation

The United States v. Two Trunks containing Wearing Apparel.

for their value, at the time and place of the seizure. (*United States v. Four Cases Silk Ribbons*, 1 Ben. 218.) And as all the alleged damage was subsequent to that date, it could not properly have been taken into account, either by appraisers appointed to appraise the goods, or by the parties in fixing the value by consent. If, then, the claimant saw fit to bond the goods instead of allowing them to be condemned, neither she nor her sureties can complain if they were bonded for more than they were actually worth at the time of the bonding. She preferred to give the bond, and there is no equity in her or their claim to be released from it to this extent. Nor does the alleged misconduct of the officers of the customs afford any ground for a claim, either directly for damages, or indirectly by way of recoupment against the United States.

As regards the duties, it is insisted that the case is within the principle of the case cited above, in which it was held that, if the goods are in warehouse, the proper valuation to be put on the goods is their full value less the duties, and it is claimed that this stipulation should have been for the value of the goods, less the duties, or that the payment of the duties may be treated as an equitable defence to the claim, so far as the stipulators are concerned, and that the court can, at this stage of the proceeding, give relief.

The case differs from the case cited in this, that this claimant has, by her own act, in violation of law, put these goods into the common stock of the merchandize of the country, and I think the cases are so unlike, that that case would not be a precedent for the appraisement of goods, seized in the country at large as smuggled goods, at their value, less the unpaid duties. As is pointed out in that case, if the duties had been paid, and the goods were not in warehouse, the owner, if he bonds, must give a stipulation

The United States v. Two Trunks containing Wearing Apparel

for the full value, and in that case would lose the goods, and the duties, too. The privilege given to the importer to put the goods in warehouse, carries with it the privilege of using the goods for exportation in a certain event, without paying any duties on them, and it was held, upon good reason, that in such a case, the real value of the goods to the owner or to any purchaser is their value in bond, that is, their value less the duty, and the rule adopted was based in part on the idea that such valuation was necessary, in order to give the owner the full benefit of the warehousing system. I see no reason for applying that rule to the case of smuggled goods. It is true that the Government has a lien on the goods for the unpaid duties. But the duties are also a debt of the claimant and can be collected of her by an action, if the Government chooses to prosecute therefor, and the payment of the duties on execution in such an action would not relieve the goods from forfeiture, in whole or in part.

But however this may be, there seems to be no discretion as to the amount for which judgment must be entered against the stipulators. The amount of the stipulation required by section 938 of the Revised Statutes, is determined in a mode regulated by law, and the stipulation, when given, stands in the stead and place of the goods. If cause of forfeiture is found against the goods, the court has no discretion to remit any part of it. And so it would seem there cannot be any discretion to remit any part of the stipulation. The power of remission in proper cases is given to the Secretary of the Treasury alone. And if by a mistake of the claimant, such as is made the basis of this application, a stipulation given by consent, instead of that the amount of which is to be determined in the manner prescribed by statute, is made larger than the strictly statutory stipulation

The United States v. Two Trunks containing Wearing Apparel.

would have been, it seems to me that the court has no power to reduce it. The very reason which induced the Government to assent to it, in lieu of a stipulation under the statute, may have been that it was larger in amount than it would have been if the mode prescribed by statute had been followed, and, if it is now to be departed from, there is no way in which the amount can be fixed as required by the statute. It is too late for an appraisement now, and the court cannot make a new agreement between the parties. There is no suggestion that the stipulation was procured to be signed by the stipulators, by any fraud or improper practice.

The stipulation was voluntarily given, and the claimant has had the benefit of it.

For these reasons the motion to correct or reduce the stipulation must be denied.

For the stipulators, *B. B. Foster.*

For the United States, Assistant U. S. District Attorney
S. Tenney.

Eastern District of New York.

MARCH, 1879.

THE BRIG SUSAN E. VOORHIS.

BOND FOR SAFE RETURN OF VESSEL—ACCOUNTS BETWEEN PARTY OWNERS— STIPULATION.

C., a minority owner of a brig, filed a libel against her to obtain security for her safe return from a voyage from which he had dissented. The majority owners appeared and agreed to give the security. the vessel was appraised and the security for the interest of C. was given and the vessel was released and sailed on the voyage. The security was a stipulation, entitled and filed in the cause, in the sum of \$1,300. conditioned on the vessel's safely returning "from the said voyage to the port of New York."

Afterwards C. filed a supplemental libel, in which he averred the proceedings above mentioned, and that the vessel never returned to the port of New York but was lost at sea. The claimants answered, averring that the vessel returned from the voyage dissented from, to Boston, and was then sent without objection from C. on another voyage, on which she was lost, which was claimed to have been a satisfaction of the stipulation, and setting up also that at the time when the action commenced there were outstanding bills against the vessel, which the majority owners had since paid, and that they were entitled to have the share of such bills which belonged to C. to pay, deducted from any amount due on the stipulation:

Held, That the return of the vessel to Boston did not satisfy the stipulation, which was conditioned on her returning to New York;

That the vessel having been lost, the liability of the stipulators to pay the amount of their stipulation was absolute. But they were not liable for interest during the absence of the vessel;

That the amount which might be found due upon an accounting between the majority owners and C. could not be applied to diminish the liability of the stipulators for the full amount of their stipulation.

The Brig Susan E. Voorhis.

BENEDICT, J. This action was brought by Robert P. Conk, a minority owner of the brig Susan E. Voorhis, to obtain security for the safe return of that vessel from a contemplated voyage to which he had dissented.

The vessel having been seized by virtue of the process, the majority owners appeared as claimants and consented at once to give the security prayed for. Accordingly, by consent, an order was entered, appointing appraisers to ascertain the value of the vessel, and that value having been thus ascertained, by consent, the majority owners gave the security demanded, in the sum of \$1,300, and, thereupon, on like consent, the vessel was released from custody and proceeded upon the voyage objected to.

The security referred to was in the form of a stipulation, executed by the claimants and two stipulators, which stipulation was entitled as in this cause, and was duly filed herein on the 6th day of November, 1875. It recites the filing of the libel, the seizure of the vessel, the appearance and filing of a claim by the majority owners, the value of the libellant's interest in the vessel to be \$1,300, and then goes on as follows: "And the parties hereto hereby consenting and agreeing that in case of default or contumacy, on the part of the claimants or their sureties, execution for the above appraised value may issue against their goods, chattels and lands. Now, therefore, the condition of this stipulation is such that if the said brig, her tackle, apparel and furniture, shall safely return from the said voyage to the port of New York, or in case of default, if the stipulators undersigned shall pay the said sum of thirteen hundred dollars (\$1,300), and shall at any time upon the interlocutory or final order or decree of the said District Court or any appellate court to which the above named suit may proceed, and upon notice of such order or decree to Beebe and Donohue, Esquires, proctors

The Mary Anne E. Virginia

for claimants of said brig, abide by and pay the money awarded by the final decree rendered by the court, or the appellate court, if any appeal intervene, then this stipulation to be void, otherwise to remain in full force and virtue."

The vessel having been thereafter lost at sea before any return to the port of New York, the libellant filed a supplemental libel herein, wherein after setting forth the proceedings above described, it is averred that the vessel, when released from custody, as aforesaid, was despatched by the majority owners upon the voyage dissented from and never returned to the port of New York, but was on the 18th of July, 1877, lost near the mouth of the Godaway river in Hindostan.

To this supplemental libel the claimants filed an answer, in which, after admitting the giving of the stipulation and the despatch of the vessel upon the voyage dissented from they set up that the vessel returned from the voyage dissented from to the port of Boston, which return they insist satisfied the condition of the stipulation they had given; that the return of the vessel to Boston was known to the libellant, and she was permitted thereafter to undertake another voyage without objection from the libellant, on which last mentioned voyage the loss set up in the libel occurred. The claimants further set up that at the time of commencing this action there were bills outstanding against the vessel for repairs done prior to and not in preparation for the voyage dissented from, which bills the majority owners have since paid, and for one-sixteenth of which with interest this libellant is indebted to the majority owners, and this sum they claim to recoup and have deducted from any amount found due upon the stipulation aforesaid.

There being no dispute in regard to the giving the stipulation, the non-return of the vessel to the port of New York,

The Brig Susan E. Voorhis.

her actual return to the port of Boston and her subsequent loss, the cause has been submitted with the understanding that, if in the opinion of the court the fact that the majority owners have paid bills for the vessel, incurred prior to and not connected with the voyage dissented from, for one-sixteenth of which the libellant is now indebted to the majority owners, is material to the present controversy, evidence in regard to such fact may be taken at a future time.

In regard to the questions thus presented I am of the opinion that the fact that the vessel returned to Boston and again sailed from that port upon a voyage during which she was lost, affords no defence against this demand.

The undertaking of the stipulation was clear and unmistakable, that the vessel should safely return from the then projected voyage to the port of New York, or, in case of failure so to return, that the stipulators would pay the sum of \$1,300. A return to Boston was not a return to New York, and the failure to return to New York renders the stipulators liable upon their stipulation, for the amount thereof.

It being admitted that the vessel is lost, the liability of the stipulators has become absolute to pay the full amount of their stipulation. Their liability, however, cannot be extended beyond that amount. They are not liable for interest during the absence of the vessel, and can be charged with interest only from the time of entry of a decree upon the stipulation, the terms of the stipulation being that "in case of default or contumacy execution for the above approved value (\$1,300) may issue, etc."

The remaining question is clear.

The claimants have no right to diminish the libellant's recovery upon the stipulation given for safe return, by any amount that might be found due from the libellant to his co-owners, upon an accounting between such owners as to the

The Brig *Wm. E. Van Hook*

the loss of the vessel up to the commencement of the voyage disallowed from. In the first place, the court is without jurisdiction to take such an accounting. In the second place, if such a claim could be entertained upon general principles of equity, no equity here appears, as it is not averred that the libellant is insolvent. In the third place, the present is a proceeding upon a supplemental libel to obtain a decree against the parties to the stipulation given for the safe return of this vessel. The matter of the accounts between the owners is wholly foreign to such a demand and what is more, it is a matter between different parties, for among the stipulators are persons who were never owners in the vessel. It is evident, therefore, that the state of the account between these part owners is a matter not material to the present controversy.

The libellant is therefore entitled to a decree against the stipulators upon their stipulation for the amount thereof, to wit \$1,300. He must also recover his costs.

For libellant, *Huntly & Boncers*.

For respondents, *Beebe, Wilcox & Hobbs*.

The Bark Lilian M. Vigus.

Southern District of New York.

APRIL, 1879.

THE BARK LILIAN M. VIGUS.

SEAMEN'S WAGES.—JURISDICTION.—BRITISH STATUTE.—DESERTION.—
OFFICIAL LOG.

Seamen filed a libel against a British vessel to recover wages. The owners of the vessel objected to the court's entertaining jurisdiction of the cause, and the British consul also protested against it.

Held, That, while under such circumstances, the court would refuse to entertain jurisdiction unless there were special circumstances in the case, yet in this case, as none of the seamen belonged in Nova Scotia, where the vessel belonged, and when the libel was filed it was uncertain for what port the vessel would sail, and when the cause was heard the vessel had finished her voyage and it was uncertain where she was, a refusal to entertain the cause would be practically a denial of justice and the same would be entertained; That the 190th section of the British Merchant's Shipping Act did not preclude the sailors from maintaining the action.

The libel of the seamen alleged a wrongful discharge from the vessel, in the port of New York, and the answer set up as a defence that the men had deserted. On the trial, the libellants were allowed to amend their libel so as to allege a refusal by the master of the vessel to furnish proper food and other ill treatment by him, by reason of which their contract was broken. It appeared on the trial that the men had complained of being compelled to work more hours in port than they thought was right, and that whatever refusal of food there had been, had been in consequence of their refusal to work. The men complained to the consul, who heard their case and decided that they must go back to the ship and go to work, whereupon they went back to the ship, got their clothes and left her. Entry of their having left had been made in the official log by a person not attached to the ship, but under the captain's direction. The entry was not made on that day, and the date when the entry was made was not stated in the entry:

The Bark Lilian M. Vigua.

Held, That the lack of the date when the entry was made was fatal to the value of the entry as a proof of desertion of the men under §§ 244, 250 and 281 of the Act above mentioned ;

That the certificate of the British consul that he had examined the entry and that the desertion was properly entered would be disregarded, inasmuch as it was not made to appear that the fact of the entry's not having been made on the day of the occurrence was made known to him ;

That the circumstances of the case, as shown in the evidence, did not show a justification of the seamen in leaving the ship, but that their so doing was so far mitigated by evidence of apparent connivance on the part of the second mate in efforts by boarding-house keepers to induce them to desert, that the court would not hold that their wages were forfeited, and that the libellants might recover the amount of wages due.

CHOATE, J. This is a libel for seamen's wages. The vessel is a British vessel belonging to Halifax, Nova Scotia. In February, 1877, she sailed on a voyage from Liverpool to Havana, thence to another port in the West Indies and thence to New York and thence to a port of discharge in Great Britain or Ireland, the voyage not to exceed eighteen (18) months. The bark arrived at New York upon this voyage on the 6th of July, 1877. The crew were regularly shipped for the voyage under written articles. The libellants, eight of the crew, left the vessel on the 10th of July, while she was at New York. In their libel, which was filed on the 21st of July, 1877, they alleged that they were discharged on the 10th of July. The vessel having been attached, the claimants appeared and answered, denying the discharge and averring that the libellants, without notice or reason, deserted the ship ; that an entry thereof was duly made in the official log, and that by the British Merchant's Shipping Act and by the terms of the articles they thereby forfeited their wages. Upon the trial the libellants were permitted to amend their libel by alleging "that at the port of New York the master refused to give them good and

The Bark Lilian M. Vigus.

proper food ; that he furnished to libellants rotten and maggoty food ; that he furnished no fresh meat or vegetables ; that for several days he deprived them of any food ; that he did not permit food to be cooked for them for several days ; that they were compelled to go on shore and purchase food for their necessary sustenance ; that they were compelled unnecessarily to work at unreasonable hours without food or proper rest, which was a breach on the part of the master of his proper duty and in violation of his contract with them, by means whereof the same was terminated."

It is insisted on the part of the claimants, that this Court ought not to entertain jurisdiction of the cause, but should leave these libellants to seek their remedy, if they have any, in the courts of Great Britain, to which country the vessel belonged. The British consul at this port also protests against this Court taking jurisdiction. But while it is doubtless true that the Court will in such a case refuse to entertain the jurisdiction unless special circumstances require that protest to be disregarded (*The Becherdass Ambaidass*, 1 Low. 569), yet I think in the present case a refusal to hear and determine the cause would virtually amount to a denial of justice. The domicile of the parties is an important fact in determining this question. (*Patch v. Marshall*, 1 Curt. C. C. 452.) Of the eight libellants it does not appear that any belong in Nova Scotia, and several of them are from different European countries. The bark, though bound to some port in Great Britain or Ireland, has long since finished her voyage, and it is uncertain now where she is, and at the time the libel was filed, it was wholly uncertain for what port she would sail. To send these sailors, therefore, to Halifax for the prosecution of these claims at this late day would be practically equivalent to denying their claim altogether, since there appears to be no probability that they would find there

The Bark *Lilian M. Vigus*.

either vessel or owners to sue. Whether or not the court will take jurisdiction of a controversy between foreign seamen and the master of the vessel or her owners, is a question to be determined upon the circumstances of each particular case. (*Bucker v. Klorkgeter*, Abb. Adm. 408; *The Brig Napoleon*, Olc. 215.) Nor does the 190th section of the English Act preclude the seamen from maintaining this suit, if it appears to the court that justice requires that it should entertain the jurisdiction. By that section it is provided as follows: "No seaman who is engaged for a voyage or engagement which is to terminate in the United Kingdom, shall be entitled to sue in any court abroad for wages, unless he is discharged with such sanction as herein required, and with the written consent of the master, or proves such ill usage on the part of the master or by his authority as to warrant reasonable apprehension of danger to the life of such seaman if he were to remain on board." It is urged on the part of the claimants that this constitutes a part of the contract. It is not, however, embodied in the shipping articles, either directly or by reference thereto, as a part of the agreement between the seamen and the vessel. Even if it had been, this court might still entertain the suit. The rule is thus stated by Judge Betts, in the case of *Bucker v. Klorkgeter*, Abb. Adm. 408: "While in general, our courts will respect and enforce a stipulation between the foreign master and the crew, which limits them to suing in their own country, they have frequently asserted both their power and their willingness to grant relief, whenever the interests of justice demand that they should do so." While the English courts have given effect to such stipulations in the articles, and on that ground refused relief, they have not recognized such a prohibition of the foreign law as in itself precluding them from entertaining suits by seamen. (*John-*

The Bark Lilian M. Vigus.

son v. Michellsen, 3 Camp. 46 ; *Grenar v. Meyer*, 2 H. Bl. 203 ; *The Nina*, L. R. 2 Ad. & Ec. 44.)

In view of the fact, therefore, that the connection of these seamen with the ship has been actually severed, and that the destination of the vessel was wholly uncertain, and that they have no certainty of relief, if remitted to the foreign jurisdiction, and have not their domicile there, I think it clear that this court should determine this controversy, which is, in substance, whether the circumstances under which the libellants left the vessel were such that they have thereby forfeited the wages earned by them up to the time of their arrival here.

There is no evidence whatever to sustain the allegation of the original libel that the seamen were actually discharged in New York. After some disagreement with the captain, they summoned him before the British consul, and all hands appeared at the consul's office, before the 2d vice-consul, on the forenoon of the 10th of July, and the 2d vice-consul, after hearing the complaint of the men, and the statement of the master, directed the seamen to return to the ship. The same day, between one and two o'clock, they came back to the ship, with a wagon, went into the fore-castle, packed up their clothes, and left the ship, taking all their traps with them, and never returned. They asked leave of no one to go. They were bound, by the articles, to remain by the ship, till her return to the final port of discharge in the United Kingdom, and there can be no question, independently of the question whether the statute requirements to prove desertion have been complied with, that they deserted the ship, unless their leaving was justified or excused by the circumstances of the case. The defence set up is a desertion, and a forfeiture of wages by reason thereof, under the provisions of the British Merchant's Shipping Act.

The Bark L. & M. Vega

The statute requires that upon the commission of the offense, "an entry thereof shall be made in the official log book, and shall be signed by the master, and also by the mate or one of the crew," and if the offender is still in the ship, he is to be furnished with a copy of the entry, or it is to be read over to him, and his reply is to be also entered in the log. This last requirement obviously does not apply to the case of desertion, where the seaman does not return to the ship (section 244). By the same Act (section 281), it is provided that: "Every entry in every official log shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as the occurrence to which it relates, shall be made and dated so as to show the date of the occurrence, and of the entry respecting it, and in no case shall an entry therein in respect to any occurrence happening previously to the arrival of the ship at her final port of discharge, be made more than twenty-four hours after such arrival." In this case, the master kept no official log on the voyage prior to the ship's arrival in New York. He made memoranda on pieces of paper of matters taking place on the voyage, which, by law, he was required to enter in the official log. The mate was wholly incompetent to keep this log, and immediately on the arrival of the ship in New York, the mate left the ship and did not return. On the morning after his arrival, the master engaged one Ferris, a shipping-broker, to do some business for him, and among other things, to write up the official log. Some entries were thus made, dated in the preceding February, from the captain's memoranda, which it is unnecessary to refer to further. In accordance with this request, Ferris wrote in the official log entries dated July 6th, 7th, 8th, 9th and 10th. These entries were all written either from memoranda in writing furnished by the master, or at the dictation of the master or

The Bark Lilian M. Vigus.

the second mate, and, after being written, they were carefully read over to the master, mate and steward, by whom they were signed. The second mate could not write, and he signed by mark. It is objected by the libellants, that this is not to be considered as an official log such as the statute requires, that it cannot be thus made up by a stranger; but I see no legal objection to the master or the mate thus using an amanuensis, provided that the person so employed acts simply as such, and that the proper officers and others of the ship's company duly make the entry their own by signing it, and provided they fully understand and intend that which they thus adopt and make their own. Nor does it seem to be a valid objection to these entries that prior to the arrival in New York no official log was kept. The entries for these days in port constitute none the less on that account, if they conform to the Act in all respects, an official log for the days to which those entries relate. It seems, however, to be an absolute requirement of the Act that if the entries for a particular day are not made on that day, the entry itself shall show the date on which it is made. (Section 281 cited above.) Ferris testifies that the entry for the 6th of July, which was Friday, was made on Saturday; that for the 7th and that for the 8th were made on Monday, the 9th; that generally, the entries were made on the day following the day they bear date. He does not speak positively as to those of the 10th, but upon his whole testimony they must be taken to have been made on the 11th. Yet in no one of these entries is the date on which the entry was made given. A strict compliance with the statute is required as a condition precedent to the enforcement of any forfeiture of wages under the statute. (*Maclellan's Law of Merchant Shipping*, 2d Ed. p. 233; *The Two Sisters*, 2 W. Rob. 144.) Although I do not find any case in

The Bark Lilian M. Vigus.

which this particular defect has been made the ground of excluding the log as evidence of the alleged desertion, in any decided case in England, I have no hesitation in holding that the entry is on this ground fatally bad. Under a statute of the United States, which was somewhat different in its terms, but which had a similar purpose; it was required that the entry be made upon the very day that the offence had been committed. A strict compliance with the statute in that respect has been held to be absolutely essential to the forfeiture of wages under it. (*Cloutman v. Tunison*, 1 Sumn. 381; *The Rowena*, Ware 309; *Knagg v. Goldsmith*, Gilp. 207. And see *The Cutawanteak*, 2 Ben. 189.) These statutes have received a strict construction because they are highly penal in their character. I cannot distinguish between this requirement that the date of the entry should appear in the entry itself, if it be not made on the day of the alleged offence, and any other requirement of the statute regulating the nature and mode of the entry to be made. It is not merely directory and a non-essential part of the evidence of desertion prescribed. Parliament having expressly required it to be so made, the method thus directed must be regarded as equally essential with the other parts of the Act respecting the entry in the log. A certificate of the British vice-consul on the shipping articles, that he has inquired into the matter and found that the allegation of the desertion is true and that a proper entry of such desertion in the official log has been produced to him, has been produced by the claimants. The opinion of the representative of the British government upon such a question of the construction of an English statute would, in the absence of any authoritative decision of an English court, receive the most respectful attention of this court; but in this case the irregularity in the entry in the log is not disclosed by the entry itself. It is shown by

The Bark Lillian M. Vigus.

testimony *dehors* the instrument. And there is no evidence nor any reason to believe that the fact thus testified to was brought to the attention of the vice-consul. His certificate, therefore, only shows that in his opinion the entry in the log is, on its face, a proper entry. This is doubtless correct, and in the absence of any evidence to show when an official entry is made the presumption is that it was made the day it bears date. (*Douglas v. Eyre*, Gilp. 153.) The defence therefore set up in the answer, that the libellants have forfeited their wages under the provisions of the merchant's shipping Act is not made out. Nor does the answer set up any defence by way of diminution or subtraction of wages on the ground of misconduct or breach of contract, working damage to the ship or her owners, which may, it seems, be shown by other evidence though not sustained by a proper entry in the log. (*Abb. Ship.* 11th Eng. ed. 153; *The Cadmus*, B. & H. 145; *Knagg v. Goldsmith*, Gilp. 217.) I see no legal ground, therefore, on which the libellants can be refused a decree for their wages. Though the act proved would, if properly entered in the log, amount to desertion, and would lead to a forfeiture of wages already earned, in whole or in part, according to the terms of the merchant's shipping Act, yet if no such proper entry is made, the forfeiture that would otherwise be incurred is deemed waived or released. By the 250th section of the same Act it is provided: "Whenever a question arises whether the wages of any seaman are forfeited for desertion, it shall be sufficient for the party insisting on the forfeiture to show that such seaman was duly engaged in or that he belonged to the ship from which he is alleged to have deserted, and that he quitted such ship before the completion of the voyage or engagement, or, if such voyage was to terminate in the United Kingdom and the ship has not returned, that he is absent from her *and that an entry of the desertion has been*

The Bark Lillian M. Vigna.

duly made in the official log book, and thereupon the desertion shall, so far as relates to any forfeiture of wages or emoluments under the provisions hereinbefore contained, be deemed to be proved, unless the seaman can produce a proper certificate of discharge or can otherwise show to the satisfaction of the court that he had sufficient reasons for leaving his ship." This provision of the statute, in connection with its other parts, appears to be understood as abrogating the general rule of the maritime law which punishes desertion by forfeiture of wages, in all cases where the statute is applicable, so that the proper entry in the official log is, in such a case, an essential part of the proof required to make out the defence of desertion from a British ship. (*The Two Sisters*, 2 W. Rob. 137; *Maclachlan, Law of Merch. Shipping*, 2d ed. p. 234.) From these authorities it seems to follow that the payment of wages cannot be resisted on the ground of desertion and consequent forfeiture where no such entry has been made in the official log, even though when the suit is brought the voyage is not completed or the ship has not returned, and though the evidence would sustain the charge by the general maritime law. It, perhaps, is unnecessary therefore, to examine further into the alleged excuses of the libellants for leaving the ship. But as the case has been fully tried and argued upon the merits as well as upon the technical ground of the compliance with the terms of the statute on the part of the ship, I will briefly state the result of my examination of the evidence. The seamen complain that they were served, while in port, with biscuit having maggots in them, and five of them have so testified. This charge is, in my judgment, completely disproved by the testimony of the steward and one of the seamen, the captain and second mate, and by an entirely disinterested witness, a baker, who examined the bread, and the proof is, I think,

The Bark Lillian M. Vigus.

entirely satisfactory that the bread shown to him was a fair sample of that served to the crew. The provisions furnished to the crew while in port were such as the articles required, and I find nothing in the articles or elsewhere to require the master to furnish any thing not stipulated by the articles, because he happens to be in port, where fresh meat and vegetables may easily be obtained. The charge that the master deprived them of food for several days has this foundation: The bark arrived on Friday evening. On Saturday the master was on shore most of the time, leaving the ship in charge of the second mate. The men were called up at half-past four or five o'clock in the morning and they complained to the second mate that they should not be required to work in port longer than from six to six. In consequence of the trouble between this officer and the men on Saturday morning, the master called them all aft that afternoon and told them that there was nothing in the articles limiting their work between the hours of six to six, and that they must work whenever required and must obey the second mate, and he told them that if they refused to work their grub would be stopped, and he directed the mate to give them nothing to eat so long as they refused to work; that when they were willing to go to work again they should have their meals. Afterwards, and on the same day, the master not being on board, the men refused to do duty which the second mate required of them, insisting that it was after six and that they could not be required to do such work, knocking rust out of the bob-stays, after working all day, and that they were entitled to rest, as it was Saturday night. The mate kept them at work at other ship's duty and gave them no supper. They, or some of them, then left the ship without leave, and remained away till late at night. On Sunday and Monday they all had breakfast. Most of them left the ship without leave on

The Bark Lillian M. Vigua.

Sunday after breakfast and were gone all day. Those who remained and did duty, had their dinner and supper on board. On Monday they were turned to very early, and after breakfast several of them left without leave. About two o'clock they returned, and offered to go back to work, but the second mate refused to let them turn to, and told them that they could do no more work on the ship that day. In this he clearly went beyond the instructions of the master, and in connection with what had already taken place, it was a plain intimation to them that they could get no more meals on the ship that day. Aside from this instance, which affects three or four of the men, it is not proved that there was any refusal of the master or mate to give them their meals, while they were on board, except while they were actually insubordinate. No authority is shown either justifying or condemning this mode of punishment or coercion by depriving seamen of their meals. It is obvious that it cannot safely or properly be carried very far, but as actually applied or threatened in this case, I do not think it constituted any such harsh or cruel treatment, or breach of contract on the part of the ship, as released the seamen from their contract. The refusal to let them come back to work on Monday, was after a prolonged absence without leave, and was understood by both mate and seamen to extend to that day only, for they all came back at night and had their breakfast Tuesday morning, and went to work. It was not a case where the seamen were deprived of food and were without reason to expect they could get any. (*The Castilia*, 1 Hagg. 59.) On Monday they got a summons for the master to appear before the consul the next day, and on Tuesday, the master and the men went to the consul's office, as above stated. The direction of the consul was proper, and in my judgment nothing had been done by the master in the way

The Bark Lillian M. Vigus.

of harsh or cruel treatment, which, as matter of law, justified the men in refusing to go back to their duty. They had no reason to apprehend any deprivation of food if they returned to the ship and to their duty. Instead of doing so, they went to the ship later in the day with a wagon, took away their clothes, and finally left the vessel. While, however, the case does not show circumstances which, in law, amount to a justification of the seamen in leaving the ship, it does show circumstances which so far mitigate their offence, that even if a technical desertion were made out, it would, in my judgment, call for the forfeiture of very little of their wages already earned. The forfeiture under the English statute may be of the whole or any part of the wages already earned. It appears in this case, that from the time the ship arrived, the second mate, who was left in command of her, suffered a seaman's boarding-house keeper to remain on board, and to consort with the seamen and to stimulate them to insubordination, to induce them from time to time to leave the vessel. Although by his own testimony, he overheard this person on Monday, when the men refused to do duty, tell the seamen: "Never mind, boys, I'll get you your wages," yet, he still tolerated him on the ship, and allowed him to stir up the men to disobedience, and to tempt them to leave the ship, and apparently made no effort to counteract his influence with the men. It was clearly the duty of this officer to have expelled this person, and to have cautioned the seamen against him. Both the English and American statutes make it a misdemeanor for such a person to solicit the sailors on the ship during the twenty-four hours after her arrival. This necessity for legislation to protect the seamen from this class of persons, shows how dangerous to the discipline of the ship their presence is. And it is, I think, the proper conclusion from the testimony in this case, that the second mate

The Bark Lillian M. Vigus.

was either a consenting party to the seamen being enticed away, or that he was, at the least, grossly negligent of his duty in protecting them from this interference. Three days' persistent effort of one of these persons, having a strong interest to foment trouble between them and the ship, resulted in their being enticed away and misled as to their rights. He put them in communication with lawyers on shore and it may well be presumed that the advice they got was such as would further his own purpose to induce them to leave the ship. All this the mate should and probably did foresee. I have given no credit to the testimony of the two boarding-house masters, called as witnesses by the seamen. Their statement that the master took them into his confidence and told them that he wanted to get rid of the crew, is incredible in itself, and not sustained by any other evidence; and the general appearance of these witnesses and their contradiction on many points compel me to withhold all credit from them. But I found the foregoing conclusion on the testimony of the second mate and the master. There was about five hundred dollars due to these seamen when they arrived in New York. They should not have been knowingly permitted to be enticed away so as to forfeit their wages, either through the direct acts of the master or mate, or their negligent omissions of duty. Such circumstances have been held to excuse or mitigate the offence of desertion, even where an entire justification could not be made out. And in addition to the circumstances above stated, the method of discipline adopted by the second mate, with the concurrence of the captain, was such as to aid the efforts of the boarding-house master. This discipline was work at extraordinary hours while in port, no change from the diet served at sea, deprivation of meals for refusal to work. These modes of discipline, though not illegal, could not well have been im-

The Bark Lillian M. Vigus.

proved if intended to assist those who were well known to be endeavoring to induce the sailors to leave. I think the language of Judge Hopkins, in *Magee v. Moss*, Gilpin 231, applicable to this case: "The forfeiture of wages earned by a hard and perilous service is a severe penalty and should be exacted only on a clear legal cause. So it has been considered by the courts, and those who claim this penalty have always been required to show themselves to be clearly entitled to it by the performance on their part of all the requisitions of the law. The master of the vessel must throw the fault on the offending seamen. He must deal with them fairly and honestly and in good faith. He should neither endeavor to drive them from their duty, nor deceive and entrap these rash and ignorant men into a course of conduct which he sees may draw upon them the loss of their wages while they have no such suspicion. If they are really and truly acting under a mistaken opinion of their rights and not from a dishonest or rebellious disposition, they should be undeceived, their error should be explained, or at least they should not be drawn, or permitted, by an insidious silence or inattention to their proceedings, to involve themselves in the crime of desertion with its ruinous consequences. A practice of this sort upon sailors may well be considered as a fraud, and the contriver ought not to gain by it." While it is important to adhere to the rule forfeiting wages for wilful desertion, regularly proved, for the sake of maintaining the proper discipline of the ship (*The Cadmus*, 2 Paine C. C. Rep. 243), it is equally the duty of the courts to secure to the seamen fair and just treatment and to protect them against practices such as they were exposed to in this case and which are often the means adopted to deprive them of their fairly earned wages. There is, I think, no serious injustice done to the owners of this vessel, there-

The Bark Brothers.

fore, although the failure to prove the desertion is owing to what may seem to be a technical defect in the official log.

Decree for the libellants with costs, and a reference to compute amount due.

For the libellants, *Andrews & Smith*. (W. R. Beebe, Advocate.)

For the claimants, *Hill, Wing & Shoudy*. (L. S. Gove, Advocate.)

APRIL, 1879.

THE BARK BROTHERS.

SHIPPING COMMISSIONER.—VESSEL IN WEST INDIA TRADE.—CONSTRUCTION OF REVISED STATUTES.—TENDER.—COSTS.

While, in the construction of the Revised Statutes of the United States, the presumption is against an intention to change the law, yet where the language used in the revision cannot possibly bear the same construction as the revised and repealed Act, full effect must be given to the new enactment. The master of a vessel, which had returned to New York from a voyage from Philadelphia to ports in the West Indies and thence to New York, offered to a sailor the amount of wages due him. There was a difference of \$2 between the amount offered and the amount claimed. The sailor refused to receive the amount offered and claimed that the wages should be paid in the presence of the shipping commissioner, and filed a libel against the vessel. On the trial the court found that the amount due was the sum offered. It was claimed for the sailor that under §§ 4504 and 4549 of the Revised Statutes of the United States the offer of the money was inoperative as a tender :

The Bark Brothers.

Held, That under those sections it was not incumbent on the master of this vessel to pay the sailor in the presence of the shipping commissioner of the port ;

That the tender, therefore, was good ; and that, although it had not been kept good by the payment of the amount into court under Rule 72, the suit being unnecessary and the difference between the parties trifling, no costs would be allowed to the libellant.

CHOATE, J. This is a suit for seaman's wages. The answer admits that the sum of \$65.57 is due, and at the time of filing the answer that sum was paid into the registry of the court. I am satisfied by the evidence, that although the libellant claims that there is an error of about two dollars, this is the true amount of his wages due. It was tendered to the libellant before the suit was brought, but he refused to receive it, and claimed that the wages should be paid in the presence of the shipping commissioner. Libellant's counsel now claims that the case is within Rev. Stat., § 4549, which provides that : " All seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port, or, being of the burden of seventy-five tons or upwards, from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall be discharged and receive their wages in the presence of a duly authorized shipping commissioner, except in cases where some competent court otherwise directs." This voyage was from Philadelphia to ports in the West Indies and thence to New York. By Rev. Stat. §4504, it is provided : " That nothing in this title, however, shall prevent the owner, consignor or master of any vessel, except vessels bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or the Republic of Mexico, and vessels of the burden of seventy-

The Bark Brothers.

five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or *vice versa*, from performing himself, so far as his vessel is concerned, the duties of shipping commissioner, under this title." Section 4549 is in the same title of the Revised Statutes with section 4504. It is insisted by the libellant's counsel, that the case is within section 4549, and therefore that the alleged tender was inoperative and a nullity, being in fact an illegal act—an attempt to pay off a seaman in violation of section 4549—and that this section is to be regarded as qualifying section 4504, so that as regards the discharge and payment of seamen it creates an implied exception in the operation of section 4504 as applied to a voyage between the United States and the West Indies. But I can see no difficulty in construing the two sections together and giving to both full force. Section 4504 makes a master or owner of vessels bound on certain voyages, including the present one, a duly authorized shipping commissioner within the meaning of section 4549. The terms of section 4504 are too explicit to be explained away, or to admit of an implied exception by reason of anything contained in section 4549, and I think, therefore, that for a voyage between the United States and the West Indies the crew may be paid off by the master elsewhere than in the presence of a shipping commissioner other than himself. That these provisions are somewhat different in the Revised Statutes from what they were in the statutes revised and repealed, does not, I think, furnish any reason for not giving to them this construction, since they apparently admit of no other construction, and especially by no possibility do these sections admit such a construction as will restore them to their former reading. While in the construction of the Revised Statutes, the presumption is against an intention to change the law, yet where the language used in the revision

The Schooner F. Merwin.

cannot possibly bear the same construction as the revised and repealed Act, full effect must be given to the new enactment. The tender was therefore good. It has not, however, been kept good, conformably to the 72d rule of this court, which requires the money to be paid into court, before answer, plea, or claim filed. It is not available, therefore, as a complete tender for all purposes, but as the costs are in the discretion of the court, and this suit was brought after a tender and was unnecessary, the difference between the parties, if any, being very trifling, the libellant will recover no costs.

Decree for libellant for \$65.57.

For libellant, *Henry Heath*.

For claimants, *Wm. W. Goodrich*.

APRIL, 1879.

THE SCHOONER F. MERWIN.

COSTS.

Alibel having been dismissed with costs, the clerk taxed for filing and entering "claim," "answer," "appearance" and "consent" twenty-five cents each :

Held, That the clerk was entitled to only ten cents each, and could not charge as for "making a record."

The clerk taxed five oaths at ten cents each, and five jurats at fifteen cents each :

Held, That the charge for the oath did not include the jurat, and the charges were correct ;

The Schooner F. Merwin.

That a charge of \$3 for the attendance of the clerk on the justification of sureties was correct, as being a reasonable compensation for the service;
That a clerk's fee of fifteen cents for making up the costs on the bonding of the vessel was proper;
That a charge of \$9.50 as for taking depositions by a commissioner was correct, although it appeared that the witnesses appeared before the commissioner and were sworn, and then by consent of the proctors the examination of the witnesses was written down, but not by the commissioner or in his presence, and the witnesses were then brought before him and sworn to the depositions, and he made the customary certificate;
That an item of \$50 paid to a notary public for taking depositions was correctly allowed, although he was a clerk of the proctor of the claimant;
That the charge of \$2.50 a day allowed to the marshal, by statute, for "expenses of keeping vessels," does not include wharfage, and that a bill for wharfage paid by the marshal, for the vessel, while she is in his custody, can be properly taxed as a disbursement.

CHOATE, J. In this case, in which the claimants have obtained a decree dismissing the libel with costs, the libellant has appealed from the clerk's taxation. The clerk allowed twenty-five cents each for filing and entering "claim," "answer," "appearance" and "consent." The fee bill, Rev. Stat., § 828, allows for "filing and entering every paper," ten cents. Libellant insists that ten cents only should be allowed for these items, and in this I think he is correct. The additional charge of fifteen cents appears to have been made under that clause of the fee bill which allows the clerk for "making any record" fifteen cents a folio, but there was no record made upon the filing and entering of these papers which is not fully and aptly described under the terms "filing and entering." It is objected to the item for "consent," that no such paper was filed. The allowance of this item by the clerk indicates that he found such a paper on file, or evidence in his books that such a paper had been filed. Of course, if this was not so, the allowance of any fee therefor is improper. The same remark applies to the

The Schooner F. Merwin.

item of ten cents for "entering order of approval," which is objected to on the same ground. The item for "drawing claim and stipulation" is correct, if the papers were drawn by the clerk; otherwise not. The item "6 acknowledgements," twenty-five cents each, is correct, there appearing, by the record, to have been that number of acknowledgements. The charge for "5 oaths at 10 cents and 5 jurats at 15 cents," is objected to, on the ground that the fee of ten cents for administering an oath includes the service of the clerk in making the certificate of the administration of the oath—the jurat. I think the charge is correct. The fee bill allows ten cents for administering the oath. It allows fifteen cents for "making a certificate." The two services are distinct and are both here rendered. The item "attending on justification one day, three dollars," is also correct. This is a commissioner's fee for a service rendered by him in conformity with a general rule of the court requiring the testimony upon the justification of sureties to be taken before a commissioner. And it has been held that where the court calls on an officer of the court to render services, for which no fee is by law established, he is entitled to a reasonable compensation (*The Alice Taintor*, 14 Blatch. 225), and the fee here charged is reasonable in amount and established by long usage. The item of fifteen cents for "making up the costs" on the bonding, is also proper. It became necessary for the clerk to make up for the parties a statement of the costs at that time and for this as a "certificate" or a "record" he is entitled to the fee.

The item of \$9.50 paid to the commissioner for taking depositions of witnesses, is objected to, on the ground that the services thus charged for were not rendered by the commissioner, that the witnesses were merely sworn before him, but that no such service was rendered. I understand the

The Schooner F. Merwin.

point to be that the witnesses were sworn before the commissioner and then by consent of the proctors for the two parties, the testimony was actually written down not by or in the presence of the commissioner, and the witnesses were afterwards brought before the commissioner and sworn to the depositions as made, and he made thereon his customary certificate. If this was so, I think the commissioner was entitled to his regular fees for taking and certifying the deposition, in the absence of an express stipulation between him and the parties waiving the same in whole or in part. The item of fifty dollars paid to the notary public Bowers for taking depositions is objected to on the ground that he was acting in the matter as clerk or amanuensis for the claimants' proctor. It appears that besides being a notary he was also attorney's clerk to claimants' proctor. It is claimed by libellant's counsel that the understanding was that to avoid the expense of taking the depositions before a commissioner, they should be taken down by the proctors themselves and sworn before a notary; that in pursuance of this understanding, the libellant's proctor wrote down his examination, and claimants' proctor employed his clerk, who was also the notary, to write down his. There was, however, no written stipulation to this effect, and as the depositions were apparently taken by and sworn before the notary, and the parties do not agree that there was such a stipulation or understanding, the court cannot take notice of it. The fact that the notary happened to be the clerk of one of the proctors did not disqualify him to act as notary upon the consent of the parties, nor disentitle him to his just fees therefor. This disbursement is duly vouched for and properly allowed.

Objection is made to an item of \$130.50 included in the marshal's bill, for "wharfage," on the ground that under Rev. Stat. §§ 823 and 829 no such charge is proper. Section

The Schooner F. Merwin.

823 provides: "The following and no other compensation shall be taxed and allowed to attorneys * * marshals * * except in cases otherwise expressly provided by law." Section 829 regulates the fees of the marshal, and contains the following clause: "For the necessary expenses of keeping boats, vessels, or other property attached or libelled in admiralty, not exceeding two dollars and fifty cents a day." It is insisted that this charge for wharfage is to be deemed a charge for an "expense of keeping" the vessel. Section 823 refers in terms only to compensation, and not to expenses or disbursements of the officer, incurred by him in the discharge of his duties. Section 829, however, does restrict, within certain limits, many of those items or kinds of expense and disbursements which the officer is likely to incur in the performance of his duty, and actual disbursements beyond those limits must, of course, be disallowed, where they fall within the description of the kind of expenses thus limited; but as to expenses and disbursements not provided for in section 829, and necessarily incurred by the marshal in the performance of the duties of his office, I see nothing in either section to forbid his being reimbursed such expenses as without any legislation and upon general principles of law he would be entitled to, as for money paid out at the request and for the use of another. It appears to me that the "expense of keeping," here referred to, is the expense which the marshal is put to in maintaining the actual custody of the vessel under his process, and that what he may have to pay for "wharfage" or the use of a berth for her to lie in, in safety, is not properly to be considered such an expense. The marshal as the actual custodian of the vessel, especially if the owner or master leaves her, would be bound to use reasonable efforts to protect the vessel from danger, while in his custody, as, for instance, to move her in

The United States v. The Union National Bank.

case of fire, or to use proper endeavors to put out a fire. No express provision is made for his taxing such disbursements, but I think that such disbursements may properly be taxed, if reasonable in amount and necessarily incurred; and wharfage belongs rather to this class of expenses than to the expense of "keeping" the vessel. This and the other small items in the marshal's bill are properly allowable, if duly vouched for.

Let the costs be re-taxed in conformity with this opinion.

For libellant, *W. R. Darling*.

For claimants, *R. H. Huntley*.

APRIL, 1879.

THE UNITED STATES vs. THE UNION NATIONAL
BANK.*

MONEY PAID UNDER A MISTAKE OF FACT.—LACHES.—THE UNITED STATES
AS PLAINTIFF.

A party entitled to recover money, paid under a mistake of fact, is bound to give prompt notice of the discovery of the mistake to the party to whom the money was paid.

Where the party to whom money is so paid, sustains damage in the loss of his remedy over against another party, through the negligence of the party to whom he is liable in failing to give notice of the discovery of the mistake, he is thereby discharged from liability.

* This case affirmed on writ of error to the Circuit Court.

The United States v. The Union National Bank.

The action being equitable, the United States suing as plaintiff in such action is bound by the same equitable rules as any other plaintiff in such an action and cannot recover, if through its failure to give notice of the discovery of the mistake the defendant has lost his remedy over.

In such an action by the United States, where it appeared that the Assistant Treasurer at New York gave notice of the discovery of the mistake, and demanded payment, but afterwards withdrew the notice and demand:

Held, That assuming that he was the proper officer to give such notice he was the proper person to withdraw it, and the defendant having relied on such withdrawal and thereby lost his remedy over was discharged from liability.

CHOATE, J. This is a motion for a new trial for error of law in directing a verdict for the defendant. It was not attempted on the argument to sustain the action, except as an action for money paid under a mistake of fact. Assuming that all the elements of such a cause of action once existed, a question which it is unnecessary now to examine, yet I see no reason why the United States should be exempted from the general rule applicable to any other party who is entitled to maintain such an action, that they shall not, by their delay after the discovery of the mistake, lead the party liable to them into further loss, as, for instance, the loss of a remedy over against another party. This is an equitable action and the plaintiff can only recover on showing that it is equitably entitled to the money. The duty of promptly notifying the defendant on discovery of the mistake, is conceded by the plaintiff's counsel; but it is claimed that the notice from the sub-treasurer was a performance of this duty. The discovery by the United States of the alleged mistake before that notice was given cannot, I think, be denied. Assuming that the sub-treasurer was the proper person to give the notice, and demand payment of the defendant, he was also the proper party to withdraw that notice, and I think it is clear that what took place after the notice

The Bark Innocenta.

was given, was equivalent to a withdrawal of the notice, on which the bank had a right to rely, and did rely, until it lost all remedy over against Polhemus and Jackson; and after that, only, was the claim renewed by commencement of this action. I think this is a claim in respect to which laches may be imputed to the United States, and that on the ground of laches and entire want of equity in the claim on the undisputed facts, the direction of a verdict for the defendant was right. (See *United States v. Jay Cooke*, 5 Amer. L. T. 166.)

Motion denied.

For motion, Assistant U. S. District Attorney *S. Tenney*.

For defendant, *Geo. De Forest Lord*.

APRIL, 1879.

THE BARK INNOCENTA.

DELAY IN RECEIVING CARGO.—CONTRACT.—EVIDENCE OF CUSTOM.

A freight broker engaged for a bark 100 tons of oak logs and 100 tons of other timber. The freight contract, which was in writing, said nothing about the time to be occupied in the receipt of the cargo, or the manner in which it was to be delivered to the ship. On the day after the contract was made the shipper of the timber notified the agent of the ship that the wood was heavy timber, and that the bark should be ready with corresponding tackle to take it "off the lighters" as soon as they arrived. The timber was sent alongside in lighters, and, owing to the smallness of the bark's hatch, and the contracted space between decks, though reasonable diligence was used

The Bark Innocenta.

in taking the timber on board, the lighters were detained alongside several days. The shipper filed a libel against the bark to recover the amount of the demurrage of the lighters, claiming that the cargo was agreed to be received from lighters in the customary time, and that by the custom of the port of New York, two days only were allowed for that purpose:

Held, That, as the contract did not say that the wood was to be received from lighters, the shipper could not, by his notice, impose any new terms on the bark ;

That the shipper had the right to deliver the wood alongside in what way he pleased, and it then became the duty of the bark to receive it ;

That the alleged custom to receive cargo from a lighter in two days, was not proved by evidence of the adoption by "The New York Produce Exchange" of a rule to that effect, such association having no power by their rules to make a custom binding in the port of New York ;

That no unnecessary delay or negligence on the part of the bark in receiving the wood had been shown, and that the libel must be dismissed.

CHOATE, J. This is a libel brought by the shipper of cargo against the vessel for the sum of one hundred and twenty dollars, which is described in the libel as "demurrage of lighters." The cargo was heavy oak and black walnut timber. The libel alleges that on the 1st day of March, 1877, the agents of the vessel contracted and engaged with the libellant that the vessel should take and receive on board at New York to be carried to London, about 200 tons measurement of timber ; that, by the terms of the contract, the timber was to be delivered and loaded on board of the vessel from lighters to be furnished by libellant, and that such delivery should be completed within the usual and customary time, after the lighters should be moored alongside the vessel and be in readiness for such delivery and loading ; that the usual and customary time required in similar cases is two days, by the custom of the port of New York ; that the lighters were delayed beyond that time by the slow, tedious and irregular way in which the vessel received the timber, and for this delay the libellant demands damages at the rate

The Bark *Innocenta*.

of \$20 per day, for each lighter, while so delayed beyond the customary period of two days. There was evidence tending to show that the owner of the lighters had made a claim against the libellant for this demurrage, and that the libellant had acknowledged the claim to be just as between himself and the owner of the lighters ; but up to the time of the trial, he had paid nothing. It is insisted by the claimants that on this account the libellant had not at the commencement of the suit sustained any damage, and therefore could not maintain the action ; that it was not sufficient that he may have incurred a liability, merely. It is, however, unnecessary to decide this question.

The contract between the vessel and the libellant was in writing, as follows: "Freight for London, per Italian Bark '*Innocenta*,' at pier 17, E. River, Benham & Boyeson, agents, New York, 1st March, 1877, engaged for account of Andrew Brown, about 100 tons measurement oak logs, 50 to 75 tons walnut, 25 tons white wood, at 25s. and 5p. sterling per 40 cubic feet; Churchill & Sims caliper measurement; Saml. De Bow & Haughton, brokers."

It is very evident that under this contract the vessel never undertook to receive the wood from lighters; nor is any evidence offered that delivery of such cargo is by the usage or custom of the port made in such way. On the day after the contract was made, the libellant notified the agents of the vessel that the wood was heavy timber, and that the vessel should be ready with corresponding tackle to take it "*off the lighters*," as soon as they arrived alongside. But the contract being already complete and reduced to writing, it is hardly necessary to observe that the libellant could not, by such a notice, impose on the vessel a new obligation not already imposed on her by the contract itself. It was the right of the libellant to bring the wood to the ship in what

The Bark *Innocenta*.

way he pleased, and when alongside, whether on the pier or otherwise, it was the duty of the ship to take it into her charge and keeping; but the shipper had no right to prescribe the time and manner in which the ship should actually take it on board. The shipper had a right to leave it on the pier, notifying the proper officer of the ship that it was there under the contract. He could not, by bringing up, as it were, another pier on the other side of the ship in the shape of a lighter, make the duty of the vessel in respect to it any different from what it would have been, if he had placed it on the pier already there for the purpose. If it had been agreed that it should come by lighter, there might be an obligation implied on the ship's part, to take it off the lighter in a reasonable time. I am of opinion, therefore, that the libellant has failed to make out the contract alleged in the libel, and that he has only himself to blame for any loss he has suffered from voluntarily converting the lighters he hired into piers, and that under this contract no action will lie against this vessel for loss sustained by the libellant, in consequence of the delay of the lighters while so used. But the libellant has also wholly failed to prove the alleged custom of the port of New York, limiting the time within which a vessel in this port must receive cargo from a lighter to two days. Whether such a custom, if established by the evidence, would bind a foreign ship, need not be considered, for the evidence of the alleged custom is wholly insufficient. There is evidence that the "Produce Exchange," an organization of merchants, has adopted a rule somewhat to this effect; but no such association can, by a rule, make a custom of the port, however the members of it may, as between themselves, bind themselves to observe the rule. This is matter of contract. But to make a custom of the port, the rule must be so generally known and acknowledged and

The Bark Innocenta.

acted upon, as virtually to be applied by the whole of that part of the business community which it would affect. As it is said in the books, it must be "universal." In this case, of the four witnesses called on this question, who were familiar with the trade in question, two were shown to have no knowledge of any existing custom of the port outside of the rule of the "Produce Exchange," and the strongest witness to its existence doubted its actual application as a usage to a case where, from the nature of the cargo to be received, it could not be taken on board with all possible diligence and despatch on the part of the ship, within the period of two days. Yet to be worth anything as a custom, it should have been proved that it is actually applied and enforced where, but for the custom, the time allowed would be unreasonably short. Otherwise the custom adds nothing to the general rule of law which would allow a reasonable time for taking the cargo on board, having regard to all the circumstances, if the vessel had contracted to receive it from the lighter.

The libellant has also failed to prove any unnecessary delay or negligence on the part of the vessel. It appeared that as soon as the lighters came alongside, the stevedore went to work with a suitable number of men, and the usual appliances for taking the timber on board; that the hatch by which it must be taken in was small, and the space between decks where it was to be stowed, very contracted; that there was great and unusual difficulty in taking the timber on board. I am satisfied that the vessel used all due and proper diligence to take it on board. On the third day, at noon, the work was stopped in consequence of an order given by the owner of the lighters to their masters, which prevented the stevedore from continuing the work, and this stoppage continued about twenty-four hours. It is claimed by the libellant that the occasion for this order was, that the

The Bark Henry Trowbridge.

stevedore had positively refused to take on board at all what remained of the heavy oak logs. The libellant's agent appears to have believed that the stevedore had done so upon reports to him from the lightermen and the owner of the lighters. This led to some misunderstanding, but I am not satisfied that there had been such a refusal, and therefore I cannot charge this delay to any fault on the part of the vessel.

Libel dismissed with costs.

For libellant, *Davies, Work, McNamee & Hilton*.

For claimant, *W. R. Beebe*.

Eastern District of New York.

APRIL, 1879.

THE BARK HENRY TROWBRIDGE.

SUPPLIES TO A WHALER.—LIEN.—SPECIFICATION.

Casks, furnished to a whaler, to be stowed on board to receive the oil, are necessary for the vessel, and, by the law of the State of New York, a lien attaches to the vessel for the amount of the debt incurred therefor.

It is not necessary to file a specification of such lien, where the vessel has not left the State before her seizure under process issued to enforce such lien.

BENEDICT, J. The evidence shows a delivery to the bark Henry Trowbridge of certain casks and hoops intended

The Bark Henry Trowbridge.

for use on board the vessel during a whaling voyage for which she was then fitting.

Under the circumstances attending the transaction the libellant was entitled to payment upon delivery of the articles in accordance with the order. It cannot be held that the sale was upon the personal credit of the owners, nor was there any delay of payment agreed on such as would affect the libellant's lien or show an intention to waive the lien.

Upon the evidence, the articles furnished formed a necessary part of the equipment of the vessel. Casks stowed in a whaler to receive the oil obtained from whales captured are a necessity, and no whaler is sent to sea without them. Such articles are part of the equipment of such a vessel. The vessel was a domestic vessel of the State of New York, and by the law of that State a lien attached to her in favor of the libellant for the amount of his debt. This lien was subsisting at the time of the filing of the libel, inasmuch as the vessel did not depart from the State between the time of the delivery of the casks and her seizure under the process herein. Under such circumstances it was not necessary to file a specification of the lien.

The question in respect to the effect of the statute of the State and the necessity for filing specifications in such a case were passed on by the Circuit Court for the Southern District of New York in the case of *The John Farron*. (14 Blatch. 24.) The law of that case I have no desire to question or doubt, even if it were proper for me to do so. It furnishes the authority by which this case must be decided, and accordingly the libellant must have a decree for the amount of his bill, with interest and costs.

For libellant, *C. N. Judson*.

For claimant, *Beebe, Wilcox & Hobbs*.

The Ship British America.

APRIL, 1879.

THE SHIP BRITISH AMERICA.

COLLISION.—CROSSING COURSES.—LOOKOUT.

Where two vessels came in collision near the Lightship at the mouth of New York Harbor, the ship B. A. sailing about north on the port tack, close-hauled, with the wind WNW, and the brig C. W., sailing about SW, having just changed to the starboard tack and again putting her helm down, *in extremis* :

Held, That the only question was whether the brig changed from the port to the starboard tack when so near the ship that the ship could not thereafter avoid her ;

That upon the evidence it must be concluded that the red light of the brig which should have been brought in view by that change was visible to the ship at least five minutes before the collision and at a distance of at least 3,000 feet ;

That such a distance and length of time was ample for the ship to have avoided the brig ;

That the brig was not in fault for tacking as she did at that distance, and the ship was in fault for not seeing her red light until it was within 360 feet and too late to avoid the collision.

BENEDICT, J. This action is brought by the owners of the brig Carrie Winslow to recover the sum of \$200,000, being the damages caused by a collision that occurred between that brig and the ship British America at the entrance to New York Harbor, on the morning of the 11th day of February, 1878.

Many of the important facts are not in dispute. The time of the collision was about 5 a. m. It was still dark, but the weather was not unfavorable for seeing lights, and ordinary ships' lights could be seen at the distance of at least a mile. The wind was blowing a stiff breeze from the

The Ship British America.

WNW. The British America, a ship of 1,080 tons burthen, and 180 feet long, was sailing at a speed of 6 to 7 knots an hour, on a course about north, upon the port tack, close-hauled upon the wind. She had a full crew on board, besides a Sandy Hook pilot; a man was stationed on the lookout, and the ship's lights were burning brightly. As she approached the neighborhood of the lightship, a red light was suddenly observed by her lookout within two ships' lengths ahead of the ship; the helm was immediately put hard up, but the ship had time to fall off no more than about one point before she came violently in contact with a vessel, which proved to be the brig Carrie Winslow, striking her just abaft the fore chains on the port side, and so injuring her that she shortly sank.

In the libel filed by the owners of the brig to recover for the loss of their vessel, they aver that the brig, at the time of the collision, was close-hauled upon a course crossing the course of the ship, and having the wind on her starboard side, and her lights brightly burning, and they claim that it was the duty of the ship, under the circumstances, to avoid the brig, and they charge that the failure to do so arose from not keeping a proper lookout.

The answer on behalf of the ship, while denying the charge of fault made in the libel, when carefully perused is found to aver in substance that the cause of the collision was the stopping of the brig ahead of and so near to the ship that it was impossible to avoid a collision. Whether it is intended on the part of the ship to claim that the stopping of the brig in the course of the ship arose from a sudden luff on the part of the brig when on the port tack, or by reason of a sudden luff while on the starboard tack, is left uncertain by the answer.

The Ship British America.

It will clear the case from some possible obscurity to remark at the outset that the evidence does not permit the ship to contend that the brig can be held responsible for the collision because of a luff while on the starboard tack. The brig, shortly before the collision, changed from the port to the starboard tack, and afterwards, when on the starboard tack, did put her helm down; but this last movement was *in extremis*. It was caused by the proximity of the ship, and cannot be considered as a fault on the part of the brig. If any fault was committed by the brig, it was when she changed from the port to the starboard tack. The controversy is therefore reduced to the question whether the brig changed from the port to the starboard tack when so near the ship as to render it impossible for the ship to avoid her.

It is not to be doubted that when the brig changed from the port to the starboard tack, she could have gone further upon the port tack, and that if she had continued on the port tack for a short distance further than she did there would have been no collision; and it would be easy to say that the brig caused the collision because she tacked as she did, when she could just as well have gone on without tacking. But such a conclusion would leave undetermined the question of fact upon which alone the liability of the brig depends. The vessels were in the open sea and it was no fault in the brig to take a course crossing the course of the ship, whether for a pilot or for any other reason, provided when she so tacked she was at a sufficient distance from the ship to enable the ship to avoid her. Before fault can be imputed to the brig because of her tack, the fact must be found that she was at the time of tacking so near the ship as to render it impossible for the ship to avoid her.

The Ship *British America*.

This question of fact upon which the case turns is somewhat narrow, but questions as narrow are constantly presented to navigators in actual practice, and not unfrequently are forced upon the courts for their determination. Questions of this character, when they arise in localities like that of this collision, are necessarily narrow. Locomotion in thoroughfares, upon the water as well as upon the land, is unsafe, if not impossible, unless every one can move promptly according to rule upon the presumption that all others will be equally prompt and observant of rule. It was therefore the undoubted right of the ship as she approached the harbor of New York to hold her tack boldly to the bar, assuming that no vessel would take the opposite tack ahead of her except at such a distance as would enable the ship to avoid collision,--and the brig had the equally clear right to change her tack boldly before reaching the bar, assuming that any vessel whose course she might thereafter cross would be vigilant to see her red light so soon as it should be visible, and take prompt action to avoid her, if action was required.

It has been contended that the brig was never upon the starboard tack in the sense of the law, inasmuch as the evidence shows that at the time of the collision the brig's main peak had not yet been dipped, and dipping the peak is one of the ordinary operations to be performed in making a tack. But the evidence also shows that before the collision the brig had gathered head-way upon the starboard tack with her sails full, and that the delay in dipping the peak arose from the entanglement of some rope which had no effect to check the movements of the vessel.

The brig was to leeward of the ship and ahead. She came up to the wind in ordinary time, and from that time, at least, she was displaying her red light to the ship. From that time the lights were red to green and the brig was on a course

The Ship *British America*.

crossing the course of the ship. The situation, therefore, was that of two vessels, both close-hauled, upon crossing courses, with the wind upon opposite sides. The ship had the wind on her port side, and the obligation was upon her to avoid the brig if it was possible for her to do so. The action which the ship took was promptly taken when the light was seen, and what she did was the right thing to do ; she is therefore blameless unless the brig's light was visible before the time when it was seen and reported by her lookout, and when she had time to alter her course sufficiently to avoid collision.

The obligation binding upon the ship would be the same if, as stated in the ship's answer, the brig had stopped on her course when ahead of the ship, provided such stoppage occurred at a sufficient distance ahead of the ship to enable the ship to avoid her. But the brig did not stop in the way of the ship. When her light was seen she was under full headway on a course crossing that of the ship. She was approaching the course of the ship, and from the time of her coming into the wind her light was visible to those on board the ship. The question to be determined, therefore, is whether when she came into the wind, the distance between the two vessels was sufficient to enable the ship to avoid her.

The ship, in her answer, sets forth that the distance did not exceed two ship's lengths and was wholly insufficient to enable her to avoid collision ; and on the part of the brig it is insisted that the distance was much greater than is claimed by the ship, and sufficient to enable the ship to avoid the brig with ease. This question is, from the nature of the case, one that cannot be determined by reference to direct evidence. Its solution can only be accomplished by a close examination of the evidence, in order to ascertain what facts

The Ship *British America*.

have been established, and a careful judgment in regard to the bearing of these facts upon the point in controversy. Much an examination I have endeavored to make, and the result has been to satisfy me that it is possible to say with confidence and upon evidence, that the distance from the ship at which the brig was when her red light could have been seen by those on the ship, and would have been seen by a vigilant lookout, was sufficient and more than sufficient to have enabled the ship to pass under the stern of the brig in safety.

The argument on the part of the ship is that the distance between the two vessels at the time the brig's red light became visible did not exceed two ship's lengths, because the ship's lookout did not see the brig's light until it was within that distance. It is said the fact of a lookout being stationed forward on the ship raises the presumption that he saw the light as soon as it became visible. But such a presumption, even when reinforced by the testimony of the lookout that he was vigilant, does not establish the fact that the brig's light was not visible before it was seen by him, when as here it is impossible to reconcile the statement of the lookout with the evidence as to what transpired on board the brig after she came head to wind and before the collision. The evidence as to the acts done on board the brig during this period defeats all presumption in favor of the ship's lookout, and shows that instead of being vigilant, as he says, he was negligent, and thereby caused the disaster that followed.

Before proceeding to notice what transpired on board the brig, as indicating the lapse of time between the display of her red light and the collision, it is important to call attention to the following facts stated in the ship's answer, or proven by her, viz. : The ship was sailing at a speed of six

The Ship British America.

or seven knots an hour. The brig's red light when first observed was within two ship's lengths ahead of the ship, *i. e.*, 360 feet. The ship's helm was immediately put hard up, and she had fallen off about one point when she struck the brig.

The time that elapsed between seeing the brig's red light and the collision was about 20 seconds. The mate says: "It was a very short time. I had just time enough to shout to the man at the wheel to put the wheel hard up, and the pilot jumped aft, and they were on to us." And the master of the ship proves the further fact, that "the ship in that breeze, and under the sail she had, would swing six points to the wind in about 30 seconds." These facts warrant the inference that the ship, at the time in question, with helm hard up, would describe a curve whose radius would not exceed 1,000 feet. This inference is not at variance with the common experience of mariners as given in the "American Rule of the Road," where it is said (p. 159), "a curve whose radius is 250 yards is full allowance for all but the longest and largest class of ships." A distance of 1,000 feet was sufficient, therefore, to enable the ship to clear the brig, and, according to her own statement of her speed, three minutes of time would put her at more than 1,000 feet.

Having in view the time in which it was possible for the ship to change her course so as to avoid an object ahead of her, attention may now be directed to the acts proved to have been done on board the brig during the period after she came head to wind and before the collision.

In regard to what transpired on board the brig after she came into the wind upon the port tack, there is little room for dispute. The brig was sailing with her foresail clewed up, in a strong breeze. Upon the port tack her course was the same as that of the ship, but she did not sail

The Ship British America.

as close to the wind as the ship by about one point. She was ahead and to leeward of the ship. The master having concluded to tack for a pilot, took the wheel and hove the vessel into the wind. All the operations pertaining to tacking were then performed, and everything coiled away, save only the dipping of the main peak, of which mention has already been made. The master then surrendered the wheel to a seaman, and went over the cabin to the poop deck, and after that, and when the vessel was under full headway, with the spray flying over her starboard bow, the lookout reported the ship's light. Soon he reported it again. The mate went forward to the topgallant forecastle and returned to the poop deck; then by order of the master he went to the forecastle and got a torch, which he lit and swung over the port side. The wheel was then hove hard down, and the vessel swung into the wind or nearly so, when she was struck by the ship. The acts appertaining to tacking the brig, done during this period, were not performed in haste under apprehension of danger, for no alarm was felt by any one on board the brig until the lookout reported the light the second time. On the contrary, the evidence indicates that rather more than the time ordinarily required to tack the vessel was occupied on this occasion; for it appears that in hauling the yards one was hauled too much and the other too little, so that the chief mate was obliged to have them trimmed to suit him, and the midship staysail having got snarled he was obliged afterwards to trim that, and then the halliards at the main peak having fouled, most of the crew were called aft to dip the peak. The evidence in respect to the presence of the crew at the main peak halliards is conclusive to show that the brig was then under headway upon the starboard tack.

The Ship British America.

But while there is little room for dispute as to what acts were done on board the brig, in regard to the time occupied there is a great difference of opinion. In behalf of the brig it is contended that the time was not less than ten minutes, during which period the ship would sail more than a mile, at the rate of speed she is admitted to have been going. In behalf of the ship it is earnestly insisted that the time was less than three minutes. Of course no witness is produced who noted by a watch the time thus occupied. What the time was must be a matter of sound judgment and inference from other facts that are proved. Several classes of facts are proved which bear upon this question. Witnesses have been produced in behalf of the ship who by actual observation, watch in hand, have noted the time occupied by other vessels more or less similar to this brig, in tacking under circumstances more or less similar to those under which she tacked upon the occasion in question. Of these, Conway, a mariner of experience, who watched vessels tacking on two occasions at Fort Hamilton, found the time from "helm-a-lee" to the time of filling away, required by the vessels he observed, to be three minutes and a half. This witness was asked by the claimants to give his judgment as to the time the Carrie Winslow would require to gather headway after the order "hard-a-lee" under the circumstances proved in this case, and he gave the time as about four and a half minutes, a period of time sufficient to enable the ship to go 2,700 feet and over, sailing as stated in the answer.

To throw light upon this question the libellants have called a witness in no way connected with this collision, who has sailed this brig and knows from actual practice the time ordinarily required to tack her. The judgment of this witness is that under the circumstances proved, eight to ten minutes would necessarily elapse from the giving of the or-

The Ship British America.

der hard-a-lee on board the brig until she filled away on the starboard tack. This is the witness's estimate of the time required, never having noted the time by a watch. The master of the ship, who knows the circumstances of wind and sea as they were at the collision, estimates that the brig, if an ordinary working vessel, would require from five to six minutes from the time she commenced to tack until she fills away and gathers headway. The mate of the ship thinks that the brig would gather headway in five minutes.

There is also the testimony of some eleven ship-masters and pilots who have been called to give their judgment as to the time that would necessarily elapse on such a vessel as the brig, under the circumstances proved, from "hard-a-lee" until she filled away. Five of these witnesses are called by the claimants, and their statements of the time requisite vary from two and a half to five minutes. One of them gives rather more. Six witnesses are called by the libellants, whose statements of the time requisite vary from eight to fifteen minutes.

And finally there are the estimates of the officers and crew of the brig, who were actually engaged in performing the acts done on board the brig. Their estimates of the time occupied vary from ten seconds to fifteen minutes. Two of these witnesses, upon the inquiry of the claimants, say that the brig required from ten to twenty minutes to tack under the circumstances; but this estimate is not in harmony with the rest of their evidence, which, taken by itself, tends to show that the collision followed immediately upon the reporting of the ship's light by the lookout of the brig; although it should be noticed that one of these witnesses, Costar, agrees with the rest of the crew in saying that the brig had filled away on the starboard tack, and the other, Anthony, proves that the master had surrendered the helm

The Ship British America.

after the tack was completed, and before the collision. The man to whom the wheel was surrendered estimates that he had the wheel five minutes before the ship's light was reported. This estimate is doubtless too high ; but that some time elapsed after the brig filled away, before the collision, is clearly proved. From all this evidence I conclude that no injustice will be done the ship by the finding that the red light of the brig was visible to her for a period of at least five minutes before she struck the brig.

This conclusion is supported by other facts proved in the case, which may now be noticed. Of course, from the time the ship's light was reported by the lookout of the brig, the master and mate then both on deck, as well as the crew, knew that the ship was approaching on the opposite tack, and yet the announcement of the light caused no alarm whatever on the brig. It is impossible to doubt, therefore, that those on board the brig, having the ship's light then in view, and called on to form a judgment as to the distance, concluded that there was then sufficient distance between the vessels to enable the ship to avoid them. This conclusion, shown by the conduct of every person on the brig's deck, and formed at the time by seamen who knew that their vessel was upon a course crossing that of the ship, goes a great way to prove the fact that the distance was sufficient.

Again, a comparison between the alarm displayed by those on board the ship when they saw the brig's light, and the absence of alarm on the brig when the ship's light was there reported, makes it plain that the distance between the vessels at the time the brig saw the ship's light, was to an important extent greater than the distance between the vessels when the ship's lookout first saw the brig's light. It would seem, therefore, that some negligence on the part of the ship's lookout must be conceded, and the fact is suggestive.

NEW YORK,

board the brig when
oved that when the
p did not alter her
te went forward and
re was room for the
o do. Furthermore
been announced the
and the chief mate
to light the torch,
lit the torch, and
the ship. It is diffi-
ave given that order
eels at that time was
on to avoid the brig.
torch, which is proved
not only after the ves-
board tack, but after
eeced, also shows that
not been seen by the
ely watched from the
ne master would have
the mate would have
the ship had up to
course made by the
ing the brig's light—
ed on board the brig.
at the argument made
resumption of a per-
of that vessel, has far
aster of the brig. On
whether there was any
ous to tack, attached
end, but to the mas-

The Ship British America.

ter, who had charge of the deck, and who alone was to determine when to tack. For the master to tack in that locality and wind, without first making careful observation whether any vessel was near enough aft him to render such a manœuvre dangerous, would be great negligence; and in view of his responsibility for the property in his charge, the presumption against such neglect on the part of the master is much stronger than any presumption that a seaman stationed on the lookout performed that duty with vigilance. In the present case, the testimony of the master is wanting, for the master as well as the steward was lost when the brig went down. The chief mate, however, who was also on-deck, swears that he looked before the tack was made and the ship's light was not then in view: which is evidence to confirm the position of the libellants, that when the brig tacked the distance between the vessels exceeded a mile.

The circumstances which I have thus noticed, coupled with the evidence before alluded to, force the conclusion that the brig's red light was displayed to the ship for a period of at least five minutes before the collision, during which time the ship sailed three thousand feet or over by her own showing, and in which time she could certainly have avoided the brig.

There would be no doubt, I take it, as to her negligence, if the ship, sailing six or seven knots an hour in a strong breeze, had run into the light-ship, having seen it at the distance of 3,000 or even 1,000 feet; but the brig was moving to the westward from the time she filled away, and by so much reducing the space necessary to enable the ship to clear her. I cannot doubt, therefore, that, upon the evidence as it stands in this case it is my duty to decide that negligence on the part of the ship in not seeing the brig in time to clear her caused the collision in question.

The Steam-tugs James Bowen and L. P. Dayton, and the Scow Number Four.

Having reached this conclusion from the testimony to which I have referred, it is unnecessary to consider the other fault claimed on the trial, but not set up in the answer, that the ship was also in fault for the manner in which her lights were set.

For libellants, *Scudder & Carter*.

For claimants, *W. W. Goodrich*.

Southern District of New York.

MAY, 1879.

THE STEAM-TUGS JAMES BOWEN AND L. P. DAYTON AND THE SCOW NUMBER FOUR.*

COLLISION IN HUDSON RIVER.—PLEADINGS.—TUG AND TOW.

The barge C., being towed down the North River alongside of the tug D., came in collision with a scow in tow of the tug B., which was going up the river. The owner of the barge filed a libel against the two tugs and the scow to recover the damages sustained by her. Each of the vessels filed a separate answer. Each tug denied any fault on its part and charged that the collision was due to fault of the other tug. The case was submitted to the court on the pleadings alone:

Held, That the fact of the helplessness of the barge was *prima facie* evidence that the collision was caused by the negligence of one or the other or both of the tugs, but was not *prima facie* evidence of the negligence of either tug alone ;

*Affirmed on appeal, 18 Blatch. 411.

The Steam-tugs James Bowen and L. P. Dayton, and the Scow Number Four.

That the answers of the tugs were not evidence against each other ;

That there was therefore on the facts admitted no presumption of fault against either tug ;

That the answer of neither tug admitted that the tug was acting in violation of the 18th rule of navigation ;

That the question whether that rule imposes on the two vessels an obligation to port her helm depends partly on the distance between the two courses on which the vessels are proceeding, and the rule does not preclude the vessels from passing on the starboard side, if the movement for that purpose is seasonably commenced and executed ;

That the libel therefore must be dismissed against all the vessels.

CHOATE, J. This is a libel brought by Thomas McNally, the master and owner of a barge called the Centennial, to recover for the loss of the barge and her cargo by collision. The case has been submitted on the libel and answers. The facts admitted by the pleadings are that the Centennial was, on the evening of February 14th, 1879, after dark, which was the time of the collision, in tow of the L. P. Dayton, being lashed to the steam-tug on her starboard side, and her stem projecting about twenty feet ahead of the bow of the tug ; that the tug had another barge or canal boat outside of the Centennial, and a third lashed to her port side ; that the L. P. Dayton with her tow was bound down the North River to the Erie Basin, Brooklyn ; that the steam-tug James Bowen, from Williamsburg, bound up the North River to some point in Jersey City, had the scow Number Four in tow, lashed to her port side ; that about off pier One, North River, the Centennial and the scow Number Four thus in tow of said tugs respectively came in collision, by the effect of which the Centennial was so injured that she and her cargo were totally lost. The libel charges various acts of negligence on each of the tugs. It contains no averments of negligence against the scow Number Four. An answer has been put in for the scow, denying any negligence or responsibility for the collision,

The Steam-tugs James Bowen and L. P. Dayton, and the Scow Number Four.

and it is conceded that the libel must be dismissed as to the scow. It is claimed, however, for the libellant, that he is entitled to a decree against both the tugs upon the pleadings: *First*, on the ground that as the Centennial was entirely helpless, having no motive or steering power herself, and as the tugs in their answers do not set up in defence any fault in the Centennial, nor any inevitable accident, but allege only against each other negligence which caused the collision, the burden of proof is on them to prove the allegations by which they severally seek to exonerate themselves by reason of the negligence of the other; and, *Secondly*, on the ground that each of the tugs admits in its answer that it was violating the 18th of the rules for prevention of collisions, that is, that in meeting the other tug coming upon the opposite or nearly opposite course, it starboarded, instead of porting as that rule requires of steam vessels, "meeting end on or nearly end on, so as to involve risk of collision," and that therefore unless this breach of a positive rule of navigation is shown by proof to be excused, the libellant may rest on this admission and is entitled to a decree, and that the burden of showing the excuse, if alleged in the answers, is on the tug.

1. As to the first point, the learned counsel for the libellant cites several cases in support of his position. (*The Granite State*, 3 Wall. 310; *The Louisiana*, 3 Wall. 164; *The Washington Irving*, Abb. Adm. 336; *The Charlotte Raab*, Bro. Adm. 453; *The John Adams*, 1 Cliff. 404; *The Sea Nymph*, 1 Lush. 23.) These are cases of libels brought to recover for injuries received by a vessel at anchor or lying at a pier, or a vessel at or immediately before the time of the collision in stays and so having no power to manœuvre for the purpose of avoiding the danger, except the case of *The Washington Irving*, which was a libel by a sailing vessel against a steamboat which ran into her while keeping on her

The Steam-tugs James Bowen and L. P. Dayton, and the Scow Number Four.

course. In all these cases the case shown against the colliding vessel was one in which the libelling vessel was shown either conclusively or *prima facie* to be without fault and powerless to avoid the injury, and the admission of the collision was itself *prima facie* proof of negligence of the colliding vessel and of her alone. They, however, are not authorities in favor of this libellant, because his barge, though wholly under the control of one of the tugs, was in motion with that tug, and though, the barge herself was helpless for the purpose of avoiding injury by any movement of her own, yet, inasmuch as the injury may have happened through the negligence of *either* tug, the proof of the helplessness and freedom from fault of the barge only lays the foundation for the conclusion or is *prima facie* evidence that the collision was caused by the negligence of one or the other or both of the tugs. It is not *prima facie* evidence of negligence of either, since it is entirely consistent with these facts that it may have been caused wholly by the negligence of the other, nor is there any presumption against either as between the two. Each of the tugs in its answer alleges that it was guilty of no negligence and charges the fault wholly on the other. Of course their answers are not to taken as evidence against each other. This is not, therefore, a case like those cited where the answer admits or the proof shows a state of facts constituting a *prima facie* case of negligence and the matter relied on in excuse or explanation is strictly justificatory or excusatory matter as to which the party alleging it assumes the burden of proof; but quite the contrary, it is a case where the facts admitted do not raise any presumption of fault against either of the accused parties.

2. As to the second point taken, I think a fair construction of the answers of the claimants does not support the position that either of the tugs admits that it was acting

The Steam-tugs James Bowen and L. P. Dayton, and the Scow Number Four.

in violation of the 18th rule of navigation. The answer of the L. P. Dayton admits that the tugs were approaching on opposite or nearly opposite courses, and alleges that it was a case in which each was bound to pass the other on the starboard side; that the Dayton took proper measures to do so, but that the Bowen failed to give heed to her signals, and by her negligence brought the tows together. There is not an admission here that the tugs were, in the language of the 18th rule, meeting "end on or nearly end on, so as to involve risk of collision." It is obvious that two vessels may be proceeding on directly opposite courses, and yet not be meeting "end on or nearly end on," or proceeding so as to involve danger of collision. The question, whether this rule imposes an obligation on the two vessels to port, depends partly on the distance between the courses on which the two vessels are proceeding, nor does the rule preclude vessels from passing on the starboard side of each other, if the movement for that purpose is seasonably commenced and executed.

The answer of the James Bowen does not admit that the two tugs were meeting "end on or nearly end on, so as to involve risk of collision;" on the contrary, while it admits that each tug blew two whistles as if with the purpose of passing each other on the starboard side, and that the Bowen did starboard for that purpose, yet, in stating the relative positions of the two vessels when the Bowen made the Dayton and when this manœuvre was commenced on the part of the Bowen, I think the fair meaning of the answer is, that the Dayton was on a course nearly opposite to that of the Bowen, but so far to the eastward of it that the vessels were not meeting "end on or nearly end on, so as to involve risk of collision," and therefore that it was not a case within the 18th rule, and that the collision was caused by the Dayton's not keeping her course, but by her changing

The Steam-tug M. R. Brazos.

her course to the westward, and notwithstanding the movement of the Bowen in the same direction, coming in collision with the Bowen's tow by attempting to cross her bows. Neither answer, therefore, admits the violation of the 18th rule.

Libel dismissed, with costs to the several claimants.

For libellant, *E. D. McCarthy*.

For the Bowen and the scow, *W. D. Shipman* and *Jos. Larocque*.

For the Dayton, *R. D. Benedict*, and *J. E. Carpenter*.

MAY, 1879.

THE STEAM-TUG M. R. BRAZOS.

COLLISION IN EAST RIVER.—TUG AND BATH HOUSE.—ENGINE CATCHING ON THE CENTRE.—JURISDICTION.

The steam-tug B., having three barges in tow, went into the cove at the foot of 65th street, East River, to take up a fourth. In coming in, her engine caught on the centre and she drifted towards the rocks. The pilot, as soon as possible, turned her head out of the cove and went ahead, but before he could get out, she was carried by the tide so near the Point as to run against the corner of a floating bath house which was moored to the shore there:

Held, That the bath house was not a vessel;

That the admiralty had jurisdiction of a libel filed by the owner of the bath house against the tug, to recover the damages caused by the tug;

That the tug was not in fault for the engine's catching on the centre, or in her navigation otherwise, and the libel must be dismissed.

The Steam-tug M. R. Brazos.

CHOATE, J. This is a libel for collision between the steam-tug M. R. Brazos and a floating bath house belonging to the libellant, August Brown, which was, at the time of the collision, moored to the westerly shore of the East River, near the foot of East 65th street. Between 56th and 64th there is a cove, into which the tug had gone with three loaded boats in tow for the purpose of taking in tow a fourth boat or barge, loaded with manure, at a pier near the foot of East 63rd street. She was bound from New York to Saybrook, Conn. At 64th street, the upper or northerly end of the cove, the shore sets out boldly into the river, forming a high point of rocks, against which the flood tide sets with considerable force. The libellant's bath house was moored to the rocky shore about sixty feet above this point, and it projected out into the river considerably further than this rocky point. It was framed with timbers and was about forty-nine feet long and thirty feet wide, and except for a short time at low tide it was wholly floating in the water. At low tide a small portion of it next the shore rested on the rocks under the surface of the water, the rest of it being afloat. It was secured to the shore by poles and chains, so arranged as to allow it to rise and fall with the tide, one end of the chains being fastened securely to the structure itself and the other end being attached to pins inserted in holes drilled in the rocks. Access to it from the shore was had over a gangway of planks. It was placed there by permission of the department of docks of the city of New York, for the purpose of being used as a public bath, but it lay outside the bulkhead line as established at that time. It was so constructed that the tide flowed freely through it. It was kept afloat in part by the buoyancy of its materials and in part by barrels underneath some of its outer timbers.

The Steam-tug M. R. Brazos.

The collision happened about ten o'clock on Sunday morning, August 31st, 1873. The day was warm and fine and the river at the time was free from other vessels. The tug having gone into the cove for this fourth boat and come out without taking her up and proceeding on her voyage up the East river, came so near to the bath house that the barge, on her port side, struck against the outer and lower corner of the bath house, injuring and shattering it so that it fell apart and was carried off by the tide. The libel alleges that the collision was caused by the negligence of those in charge of the tug.

It is objected by the claimant, the owner of the tug, that the court has no jurisdiction of the cause, on the ground that the injury complained of was not on the water but on the land, within the meaning of the rule governing the jurisdiction of the admiralty courts in actions for marine torts. It is clear that the libellant's bath house, though described in his libel as a "vessel," was not a vessel constructed or used or intended to be used as an instrument of commerce or navigation. The test, however, of the jurisdiction of the courts of admiralty in respect to torts, is whether the place of the alleged injury was "on the water." (*The Maud Webster*, 8 Ben. 547 and cases cited.) This structure cannot be said to have become a part of the land. Its connection with the shore was for a temporary purpose. The testimony shows that it was a movable structure, moored in this place in tide waters, for use as a bath house during the summer months, the design of the owner being to disconnect it from the shore in the Autumn and float it away to some more suitable place for laying it up during the winter. The mode of its attachment to the shore was adapted to this purpose and was such that it could be readily disconnected. I do not see that the case is any different from what it would be if the

The Steam-tug M. R. Brazos.

bath house had been moored at anchor in the same place or out in the middle of the river. The case is clearly distinguishable from the case of *The Maud Webster*, cited above, in which it was held that the place where the derrick which was injured stood had become a part of the land. The libellant, therefore, has the right to have the case determined on the merits.

The defence set up by the tug is that the injury was the result of inevitable accident—that while the tug was properly and for a lawful purpose and without negligence attempting to back up to the pier in the cove to take in tow the boat loaded with manure, her engine, without fault on the part of the engineer, caught on the centre; that she used all proper diligence in prying the engine off the centre, and that in the situation in which she then was, having been drifted by the tide while thus helpless towards the rocks on the point at 64th street, the only proper and prudent course to avoid going ashore was to head out into the river and go ahead with all speed; that she did this with all possible expedition and thereby succeeded in avoiding the point, but the tide still setting her up towards the corner of the bath house after she cleared the point, she had not gained sufficient headway to clear the bath house, and that without fault on her part, the boat on her port side struck the corner of the bath house and did the injury complained of. This defence is, I think, made out. The testimony in this case shows very clearly that the catching of the engine on the centre is an accident which cannot, by the exercise of any degree of watchfulness be anticipated or by any precaution prevented, and that it does not show any defect in the machinery or want of care in the engineer. Up to the time the engine so caught on the centre the management of the tug was without fault. She had a perfect right to come into this cove to take the

The Steam-tug M. R. Brazos.

boat in tow. She lay there off the pier a short time, drifting slowly up with the tide, stopped, or almost stopped, and hailed those in charge of the boat to be taken up. Her attempted movement by backing to take up the boat, which was in an eddy setting down along the shore on the inside of the cove, was proper. The drifting of the boat towards the point while her engine was caught made it impossible for her to resume this movement. Her pilot immediately did what was obviously the only safe thing for him to do, turn her head to the river and go ahead as fast as he could. By doing so he cleared the point only by about fifteen feet. The evidence shows that when he thus started to go ahead he put his wheel a-port so as to head her out into the river; that she grazed so near the rocks at the point that it was necessary to put the wheel amidships in passing in order to throw the stern of the tow off from the rocks, and that when the stem of the tow had got by the bath house he attempted to keep the stern of the tow from coming in contact with the bath house by putting his wheel to starboard in order to throw the stern off. It was a very close thing between the force of the tide setting up the river and the headway of the tug driving her out into the river, and the force of the tide proved too strong. But the real cause of the collision was the catching of the engine on the centre and the consequent drifting of the tug and tow into a position where, with the exercise of all reasonable care and skill, it was impossible to avoid coming in contact with the bath house. There was no fault in the construction or motive power of the tug. She had no larger tow than she could properly manage. Her pilot was familiar with the navigation of the river; he knew the set and force of the tide and the nature of the navigation he had to encounter in going into this cove. It is true that he had not actually been to this pier before, but that is im-

The Steam-Tug Senator Mike Norton

The Steam-Tug Titan

and that he was familiar by frequent observation in navigating the river with the tug at the pier, and there was no real excuse in going into the pier nor want of skill in endeavoring to extricate the tug from the situation in which she was unfortunately placed while there. I have given no weight to the suggestion that the ball house was an obstruction to navigation. I do not perceive that, if that were so, the tug could justify her own negligence in running against it.

Judge dismissed with costs.

For libellant, D. McMahon.

For defendant, W. R. Beebe.

MAY, 1879.

THE STEAM-TUG SENATOR MIKE NORTON. THE STEAM-TUG TITAN.*

COLLISION BETWEEN STEAMERS IN EAST RIVER.—LIGHTS.—WHISTLES.

A collision occurred in the evening of October 1st, 1875, about off Pier 1, East River, in New York harbor between two steamers, the T. and the S. M. N. The T. was bound from pier 5, East River, to pier 14, North River, to lay up for the night. The S. M. N. had towed a bark in from sea and anchored her between Hedges' Island and the Battery, and was bound for pier 16, East River. Both boats had their lights set and burning. The pilot of the T. averred that a ferry boat having passed ahead of him going to the northward, he ported his wheel following her up, and as she passed him he saw both

*Affirmed by the Circuit Court on appeal.

The Steam-tug Senator Mike Norton.

The Steam-tug Titan.

the red and green lights of the S. M. N. ahead of him about 400 to 600 yards off, his boat at the time making seven or eight miles an hour; that he at once blew one whistle and ported his wheel and kept on a port wheel till the S. M. N. came in collision with the T., striking her on the port side nearly at right angles; that the S. M. N. answered his single whistle with a single whistle, but that her pilot starboarded his wheel instead of porting it, and that when the vessels were three or four lengths apart he rang his jingle bell to give the T. more speed, and if possible, get by;

The story of the S. M. N. was, that she made the green light of the T. on her starboard bow, whereupon the pilot of the S. M. N. blew two whistles and put her wheel slightly to starboard, and that the T., after waiting about a minute, answered with one whistle and ported her wheel and ran across the course of the S. M. N. and thus caused the collision:

Held, That it is difficult to believe that, after the pilot of the S. M. N. had answered the single whistle of the T. with a single whistle, he starboarded his wheel;

That, if the account of the pilot of the T. were true, he was in fault, because as soon as he saw that the S. M. N., after having answered his whistle with one whistle, was running down on him with a starboard wheel, he should at once have stopped and backed, instead of increasing his speed;

That, on the evidence, the S. M. N. blew two whistles before the T. blew one, and that at that time the green light of the T. alone was visible, and that the S. M. N. did not answer the single whistle of the T. with a single whistle;

That the T. was solely in fault for the collision.

CHOATE, J. These are cross-libels to recover damages caused by a collision between the two steam-tugs on the evening of October 1st, 1875, about off pier 1, East River. The Titan was bound from pier 5, East River, to pier 14, North river, to lay up for the night. The Norton had towed a bark in from sea and had anchored her in the North River between Bedloe's Island and the Battery, and was bound for pier 16, East River. The collision happened after dark and both boats had proper lights. The tide was the first of the flood and the night clear.

The case of the Titan, as stated by her pilot, is that when he got out into the river from pier 5 and got straight-

The Steam-tug Senator Mike Norton.

The Steam-tug Titan.

ened down, a ferry-boat of the Hamilton ferry or South ferry line passed ahead of him going into her slip, which is between piers 1 and 2; that as she passed he ported his wheel, following her up; that when she got clear of him he made the lights of the Norton; that he saw both the red and the green light and that the two vessels were heading head on to each other and apparently somewhere from 400 to 600 yards apart; that he was making about seven or eight miles an hour; that on making the Norton he immediately blew one whistle and ported still more and kept on a port wheel to the time of the collision; that the Norton replied with one whistle, but instead of porting she starboarded so as to cross his course; that she kept on on a starboard wheel till the time of the collision, both vessels thus curving in towards the shore; that the vessels were about three or four lengths apart when he rang his jingle bell to give his vessel more speed, intending to get across the bows of the Norton; that just before the vessels came together he rang to stop and back, and his engine was reversed when the collision took place. The libel of the Titan states and the pilot testifies that at the moment of the collision the Titan was heading nearly square on to the shore, and the witnesses agree that the Norton's stem struck the port side of the Titan nearly at right angles, and a very short distance from the stem. Both vessels were injured.

The case of the Norton is that she shaped her course so as to clear the New York shore; that just before reaching off abreast of pier 1, East River, and well off the starboard bow of the Norton, the green light of the Titan was seen; that the red light was not then in sight; that as soon as the green light was seen the Norton blew two whistles and her wheel was put slightly to starboard; that the Titan did not reply promptly to the signal, but after waiting about a minute blew

The Steam-tug Senator Mike Norton.The Steam-tug Titan.

a single whistle and immediately made a rank sheer to starboard, hiding her green light and bringing her red light into view and throwing herself directly across the course of the Norton; that the Norton could not by a change of course avoid a collision, but she immediately stopped and backed, but nevertheless struck the port side of the Titan.

The evidence is conflicting, but the preponderance of the evidence is clearly with the Norton. The account given by the Titan is both improbable in itself, and, if correct, shows that she was at fault. It is difficult to believe that upon a signal of one whistle in reply to the Titan's one whistle, the pilot of the Norton should have starboarded, especially if at the time the vessels were heading head on. Of course it is not impossible, but the proof should be pretty strong. But if the account given by the pilot of the Titan is correct, it shows fault on his part, since, as soon as he discovered that the Norton, after giving one whistle as if she intended to pass on his port hand, was running down on to him on a starboard wheel, he should at once have stopped and backed instead of ringing to increase his speed, and it is quite probable that if he had done so the collision would have been avoided. His course was reckless in any view of the case, since his manoeuvre of driving ahead at increased rate of speed on a port wheel incurred the double risk of collision with the Titan and running into the piers, for which, as sworn in his libel and testified to by him, he was almost directly heading at the time of the collision. And the evidence shows that the collision happened a very short distance from the shore.

The evidence that the Norton blew two whistles before the Titan blew her one is, I think, satisfactorily proved by the witnesses from the Norton, some of whom were strangers to the Norton and have no interest or reason for bias in the cause. It is also sufficiently proved that at the time the Norton

The Steam-tug Senator Mike Norton.

The Steam-tug Titan.

blew two whistles the green light of the Titan was alone of her side lights visible from the Norton. This being so, it follows that the Norton made the Titan and blew her two whistles before those on the Titan had observed the Norton. Nor is there any improbability or any serious difficulty in reconciling it with the testimony that, when the Norton made the Titan and blew her two whistles, the Titan was well on the starboard hand of the Norton and showing only her green light to the Norton, which position would have made this signal from the Norton, that they should pass each other on the starboard hand, proper. Making due allowances for inaccuracies of the witnesses, not at all improbable in respect to distances and periods of time testified to by them, and assuming that the Titan went out into the river beyond the line along and outside of the piers, which was the proper course of the Norton from Bedloe's Island to her point of destination, the Titan must have been in this relative position with respect to the Norton at some time after leaving her berth at pier 5, and before the collision. And the testimony showing that a tow was lying at piers 2 and 3, makes it not improbable that she went out a considerable distance into the river. At any rate, I consider the testimony of those on the Norton as to what they saw, sufficient to prove this point, though it is somewhat at variance with the evidence of those from the Titan as to the distance that she went out, and also is at variance with their testimony as to the bearing and the lights they saw when they made her. What the witnesses from the Norton say that they saw of the movements of the Titan, corresponds with what those on the Titan say that they did, making due allowance for differences as to time and distances. The pilot of the Titan admits that at some time after getting out into the river he ported and kept his wheel a-port till he blew the one whistle, and then

The Steam-tug Senator Mike Norton.The Steam-tug Titan.

still kept it a-port a little more up to the time of the collision. This corresponds with what those on the Norton say they saw; first the green light of the Titan, afterwards the green light disappearing and the red light appearing and the Titan sheering around on to the course of the Norton till the time of the collision. Assuming that the Titan went out far enough into the river to show her green light, before she began to swing around to starboard, or even a short time after she so began to swing, her movement in keeping on a port wheel until she ported still more to cross the bows of the Norton was such as her proper course into the North River around the Battery called for, and this she had entered upon, as her pilot admits, before she made the Norton. The fact testified to by the pilot of the Titan, that he made the lights of the Norton immediately upon the ferry boat crossing ahead of him so as to uncover her, does not, I think, even considering the testimony of the pilot of the Norton, that he made the light of the Titan after the ferry boat passed, have any strong tendency to affect the conclusion above drawn from the testimony as to the Norton having made the Titan first on her starboard hand, showing a green light and having given her two whistles, which she did not notice or reply to, except by shortly after blowing one whistle. This matter of the particular point of time when the ferry boat passed, the length of time after her passing and before the vessels made each other and the distance she passed ahead of the Titan is a matter involving judgment as to length of time and measure of distance peculiarly subject to error, both as matter of observation at the time and of recollection afterwards. It is not satisfactorily proved that the Norton blew one whistle after the Titan blew one, as testified to by those on the Titan.

The charge of negligence against the Titan is made out, in that she did not keep a good lookout; that she did not

The Steam-tug Senator Mike Norton.

The Steam-tug Titan.

observe and respond promptly to the signal of the Norton; that she continued on a port wheel and gave a signal of one whistle to the Norton after the Norton had properly given her two whistles and had starboarded, as she was bound to do in accordance with the signal she gave; that she continued on her course with increased speed across the bows of the Norton after it was evident that by such course a collision was imminent; that she did not sooner stop and back.

The charge of negligence against the Norton is not proved. The testimony shows that she properly gave the signal of two whistles and starboarded; that as soon as there was any reason to suppose the Titan was changing her course so as to bring about a collision, she stopped and backed, but that the collision was then rendered inevitable by the fault of the Titan, and before the headway of the Norton could be entirely checked they came together.

Decree for the libellant against the Titan, with costs, and reference to compute damages.

Libel against the Norton dismissed with costs.

For the Titan, *R. D. Benedict.*

For the Norton, *W. R. Beebe.*

A Quantity of Manufactured Tobacco.

MAY, 1879.

A QUANTITY OF MANUFACTURED TOBACCO.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.—“COMMON LAW CAUSE.”—
SUIT IN REM FOR FORFEITURE.

A suit *in rem* for forfeiture of property by reason of violation of the Internal revenue laws is a “common law cause,” within the meaning of U. S. Revised Statutes, § 916 (re-enacting the Statute of 1872, ch. 255, § 6 ; 17 Stat. at Large, 197), which provides that “the party recovering a judgment in any ‘common law cause’ in any circuit or district court shall be entitled to similar remedies upon the same by execution or otherwise to reach the property of the judgment debtor as are now provided in the like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district court : ”

In such a case, after return of execution against the stipulators unsatisfied, proceedings supplementary to execution in accordance with the laws of New York are properly taken.

CHOATE, J. The property seized in this case for violation of the Internal revenue laws, having been bonded and judgment having been entered against the stipulators, and the execution returned unsatisfied, the informants have taken out an order for the examination of the stipulators in proceedings supplementary to execution, pursuant to the provisions of the statutes of the State of New York. It is now objected that this is not a common law cause within the meaning of Rev. Stat. section 916, by which section it is provided that “the party recovering a judgment in *any common law cause* in any circuit or district court, shall be entitled to similar remedies upon the same by execution or otherwise to reach the property of the judgment debtor, as

A Quantity of Manufactured Tobacco.

are now provided in the like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district court." This section is a re-enactment of Stat. 1872, ch. 255, section 6 (17 Stat. at Large, 197). This statute in section 5 refers to the practice, pleading and modes of proceeding in "other than equity and admiralty causes in the circuit and district courts." Section six provides for remedies by attachment and on execution, similar to those in the State courts in "common law causes in the circuit and district courts." The expressions here used to distinguish between the different classes of civil causes of which the circuit and district courts have jurisdiction are similar to the expressions used in the Judiciary Act, so called, Stat. 1789, c. 24, "suits of a civil nature at common law or in equity." The words thus used in that Act have been held to be used by way of distinction from "suits in admiralty," another principal branch of the jurisdiction of the Federal courts in civil causes. And the expression, "suits of a civil nature at common law," have been held to be not exclusively such suits as in respect to the nature of the cause of action or the method of proceeding were maintainable at the common law; but to include suits to enforce legal as distinguished from equitable rights, though authorized wholly by statute and prosecuted by a form of procedure not according to the forms of the common law. (*Parsons v. Bedford*, 3 Pet. 433; *United States v. Block* 121, 3 Biss. 208.) The statute of 1872 makes a similar distinction, and must obviously have a similar construction; and a proceeding to enforce a forfeiture like the present suit is a "suit of a civil nature at common law," or "a common law cause" within the meaning of this Act, as distinguished from an equity or an admiralty cause. It is brought to enforce a "legal" as distinguished from an

Tuttle v. The Albany and Rensselaer Iron and Steel Co.

“equitable” right. It has no reference whatever to any maritime right or obligation. It cannot, therefore, be considered an admiralty cause. Although it is commenced by a seizure and some of the remedies applied in the course of the suit are perhaps adopted from, or, at least, are similar to those which are applicable to proceedings *in rem* in admiralty, yet the suit is in the essential feature of the mode of trial treated as a common law cause. It is tried with a jury and results in a personal judgment. The case of *Phillips v. The Blunche Page*, 7 Reporter 326, in which it was held that the proceedings supplementary to execution could not be taken against stipulators in an admiralty cause, has no application. Admiralty causes are excluded from the sixth section of the Act of 1872.

The objection is therefore overruled.

For United States, Assistant U. S. District-Attorney
Edward B. Hill.

Contra, Birdseye, Cloyd & Bayliss.

MAY, 1879.

EBENEZER B. TUTTLE vs. THE ALBANY AND
RENSSELAER IRON AND STEEL CO.

DEMURRAGE.—BILL OF LADING.

The bill of lading of a cargo of coal shipped on a canal-boat contained the following clause: “In case the consignee discharges cargo or any part thereof, he is to charge the master not to exceed twelve and a half cents per

Tuttle v. The Albany and Rensselaer Iron and Steel Co.

ton for the same and to have four full working days after due notice of the arrival of the boat at the dock of the consignee." It also provided for \$10 a day demurrage thereafter. The boat arrived at the dock of the consignee and was reported. Other boats were waiting to be discharged by the consignee. The master was told that he might discharge his cargo, for which he was assigned dock-room, but he was also told that, if he wished the consignee to discharge his boat, he must wait his turn. He waited and was discharged in seven days from his reporting. He was then paid his freight and gave a receipt in full of all demands. Thereafter he filed a libel against the consignee to recover three days' demurrage :

Held, That the discharge by the consignee was, on the evidence, an accommodation to the master and not an exercise of the right to discharge under the bill of lading, and that the consignee was not liable.

CHOATE, J. This is a suit to recover demurrage for detaining the libellant's canal-boat beyond the time allowed by the bill of lading for discharging her cargo of coal. The bill of lading, which was dated September 8th, 1875, acknowledged the shipment of the cargo at Watkins, N. Y., "to be delivered as addressed without delay, in like good order as received, subject to the following conditions: * * * *
In case the consignee discharges cargo, or any part thereof, he is to charge the master not to exceed twelve and a half cents per ton for the same, and to have four full working days after due notice of the arrival of the boat at the dock of the consignee, in which to discharge cargo, and to pay the master for any time (exclusive of Sundays and all legal holidays) the boat is detained by said consignee for discharging after the expiration of said three days, at the rate of ten dollars per day. The master to furnish men to attend guy on boat while unloading." The consignee named was the defendant, the Albany and Rensselaer Iron and Steel Company, Troy. The boat arrived at defendant's dock in Troy and the master reported his arrival to the defendant on the 15th of September at seven o'clock in the evening. The discharge of the cargo was commenced on the 23rd of September and

Tuttle v. The Albany and Rensselaer Iron and Steel Co.

finished on the 24th at 4 p. m. The cargo was discharged by respondent's servants and by the use of their derricks. There is some conflict of evidence as to what took place between the master and the defendant's agents on his arrival and reporting in respect to the discharge of his cargo. His testimony is that he was only told that he must wait his turn to discharge; that after the discharge, when he received his freight money, he demanded his demurrage, which was refused, but that he was told that his taking his freight would make no difference about the demurrage. He signed a receipt in full of all demands. It is shown, I think, by the testimony of the employees of the company, in connection with the receipt, that on his arrival he was assigned dock-room, where he was told that he might discharge his cargo, and that he was also told that if he wished the company to discharge him he must wait his turn, and in that case that they would pay no demurrage, and that he declined to discharge himself and voluntarily waited his turn. And it is not proved that when he received his freight he claimed demurrage. It was shown that there were a large number of boats waiting to be discharged by the company; that the company had derricks arranged for discharging boats which they discharged; that there was plenty of dock-room for libellant to discharge, but no derrick that was not in use by the company. The cause of the accumulation of boats at that time was that there had been a break in the canal. He now claims three days' demurrage, amounting to thirty dollars. The question turns on the proper construction of the bill of lading and the effect on the rights of the libellant of what took place between him and the company in reference to the discharge of the cargo.

The fair construction of the bill of lading is that, if the company should elect to discharge the cargo, instead of leav-

Tuttle v. The Albany and Rensselaer Iron and Steel Co.

ing the master to discharge it himself, the demurrage should be paid. The bill of lading imposed on the master the obligation to discharge. It modified that obligation only so far as it gave the company the privilege of discharging, if they saw fit to do so. What took place was not an election on their part to discharge the cargo, except for the master and as an accommodation to him. The acts of the master in taking his freight money and receipting for all demands in full, seem to show that he so understood the agreement. The boat was not detained by the consignee, therefore, within the meaning of the contract, but by the master himself. At any rate, it was competent for the parties to vary the contract as to demurrage, and it is evident from the testimony that the captain was contented to do so in the circumstances in which he found himself placed. From the evidence it is not unlikely that he concluded that the loss of two or three days was of less consequence to him than the greater trouble and expense involved in discharging his cargo without being able to use the facilities which the company had for doing the work.

Libel dismissed with costs.

For libellant, *W. R. Beebe*.

For respondent, *Holbrook & Smith*.

Eastern District of New York.

MAY, 1879.

THE STEAM-TUG GEN. WM. McCANDLESS.

TUG AND TOW.—NEGLIGENCE.

A tug and tow was lying at the long dock at Piermont on the Hudson river.

There was a large cake of ice in the river below, which had been blown over to the east shore, leaving a clear passage for the tug and tow along the west shore. The tug thereupon started from the dock. While she was passing the ice, a corner of it caught on the east shore so that when the ebb tide made, the cake of ice was turned in the river so as to close in on the tug and tow, and force her ashore before it was possible to escape. Libels being filed by each boat of the tow against the tug, for damages occasioned: *Held*, That the master of the tug was not negligent in starting from the dock, and that the tug was not liable for the damage to the tow.

BENEDICT, J.: The decision of these cases turns upon the question whether it was negligence on the part of the tug-boat to start out from the long dock, at Piermont when she did in view of the then condition of the ice in the river. Upon this question my opinion is that the master of the tug was not guilty of negligence in this respect. When the tug started from the dock the wind had blown the cake of ice over to the eastern shore of the river and left a clear passage down along the west side abundant for the passage of the tow in safety. The tug would have passed down without accident had it not been for the fact, that after she started from the dock and when passing the ice to westward, a corner of the ice caught over on the east shore, so that when the ebb tide made, the mass of ice was turned in the river in such a manner as to close in upon the tug and force her ashore

The Steam-tug Gen. Wm. McCandless.

before it was possible to escape it. I am unable to say that any one would have reason to expect such a movement on the part of the ice against the wind, or to anticipate that the ice would catch as it did over on the east shore. The case differs in this respect from the case of *The U. S. Grunt* 7 Ben. 337), where it was held to be negligence on the part of a tug to attempt to pass through Hell Gate at the same time with a mass of ice. In that case the danger was obvious when the tug passed Astoria, where she could have waited until the ice had passed the Gate. Here, when the tug left the dock there was no reason to apprehend danger from the ice, and when the ice did turn it was impossible to escape being pushed on the flats.

As to the small damage sustained by one of the boats in starting from New York, it is sufficient to say that the evidence does not satisfy me that it was caused by neglect on the part of the tug.

The libels must be dismissed, with costs.

For libellants, *T. C. Campbell*.

For claimants, *A. S. Diossy*.

The Schooner Montauk.

MAY, 1879.

THE SCHOONER MONTAUK.

SEAMAN'S WAGES.—VESSEL SAILED ON SHARES.

The fact that the master of a vessel sails her "on shares" does not deprive a seaman hired by him of his lien on the vessel for his wages, unless it was also a part of the seaman's contract that his service was to be rendered on the personal credit of the master and not on the credit of the ship.

The fact that the seaman had knowledge of the master's agreement to sail the vessel on shares, does not raise any presumption that his own agreement was such as to destroy his lien.

BENEDICT, J. This case comes before the court upon exceptions to the answer. The action is *in rem* to enforce a lien in behalf of a seaman for his wages. The answer admits that the libellant performed services as cook on board the vessel proceeded against, during the period charged in the libel, and that he was hired by the master of the vessel at the rate of wages stated in the libel.

The defence set up is, that during all the time the libellant served on board, the vessel was chartered by or let and hired to the master, and was entirely under the control and management of the master under a contract of charter or hiring made between the master and the owner of the vessel, whereby it was agreed that the vessel should be run, victualled and manned by the master on shares, all of which was known to the libellant.

It will be noticed that in this defence it is not averred that the libellant contracted to render the service in question upon the sole and personal credit of the master. The averment simply is that the vessel was sailed by the master on

The Schooner Montauk.

shares, and that the seaman knew that fact. These two facts do not constitute a defence to the action.

As I understand the law, an agreement between the master of a vessel and the owners thereof, whereby the vessel is to be sailed by the master on shares and be under the exclusive control and management of the master, although it may constitute the master owner, *pro hac vice*, and prevent him from binding the owner personally, does not deprive the master of the power to bind the vessel for the services of the crew, nor affect his contract with the seaman, unless it appears to be a part of such contract that the service is to be rendered upon the personal credit of the master, and not upon the credit of the ship. In the absence of such an agreement by the seaman, the contract of the master for the service of the seaman on board the ship creates a lien thereon in favor of the seaman.

The fact that it is known to the seaman that the vessel is sailed by the master on shares by itself alone is not sufficient to raise a presumption that the seaman agreed for a personal credit. Hiring by the seaman upon the credit of the ship with knowledge of a contract between the master and the owner for the sailing of the vessel on shares, involves no inconsistency, because such a contract between the master and owner does not affect the master's power to bind the ship for the services of the crew. The master may undoubtedly so contract with a seaman as to deprive the seaman of a lien upon the ship, and the fact that the seaman knows that the vessel is to be run on shares is a material circumstance in an effort to show such to have been the contract; but the circumstance does not by itself prove the existence of such a contract nor warrant the conclusion that it was intended to waive a lien upon the ship.

The Schooner Montauk.

This understanding of the law is supported by the following cases :

Says Sprague, J. : " Supposing the libellants to be seamen employed in maritime service, they have a lien on the vessel whether she be sailed on shares or not. Their knowing that she was so sailed can make no difference." *The Sloop Canton*, 1 Sprague 440.

Says McKeon, J. : " It is too well settled to admit of controversy that the lien of seamen for their wages is not affected by a contract between the master and owners in reference to the sailing of the vessel on shares." *The Galloway C. Morris*, 2 Abbott's U. S. R. 168.

Says Lowell, J. : " No case has ever yet decided that seamen hired by a charterer lose their lien." *Flaherty v. Doane*, 1 Lowell 150. See *Skolfield v. Potter*, Davies (2 Ware) 392 ; *Webb v. Pierce*, 1 Cur. 113.

The case of *The Bamard*, in this court, (8 Ben. 494) proceeded upon this understanding of the law. In that case the libel was dismissed upon the ground that there were facts which showed that the agreement was to perform the service upon the personal credit of the master, and that the seaman had settled with the master upon that understanding of his agreement.

If it be the case, which I doubt, that a different understanding of the law from that indicated prevails in the Southern District of New York, the cases I have above referred to support the view which has hitherto prevailed in this district and show the weight of authority to be upon that side of the question.

This view of the case renders it unnecessary to consider the effect of section 4536 of the Revised Statutes of the United States.

NEW YORK,

the libellant, for the

THE ELOINA.

LOSS OF ANCHOR.

a storm coming up which another was let go struck
amage :

er and took the risk of the and she was liable, therefore, the other vessel.

Atlantic were riding at the night of April 12th, each having a watch on taking his berth ly to let go if wanted.

up, the Eloina began as called and immediately, but the bark did not Atlantic astern of her. other vessel begin to immediately paid out more

The Bark Eloina.

chain, and then by the mate's order let slip their anchor, in hopes to avoid the blow. The Eloina came down on her and received the blow about amidships, sustaining some injury; and the Atlantic lost her anchor and chain, received some damage about the bows, and being ready for sea was detained several days thereby—for which damages suit was brought.

For libellant, *Butler, Stillman & Hubbard*.

For claimants, *Coudert Bros*.

BENEDICT, J. This collision was caused by the neglect of the master of the Eloina to put out a second anchor. The circumstances plainly required that precaution, and were sufficient to notify an intelligent master that such a precaution could not be omitted without danger of drifting and consequent collision with the libellant's vessel then anchored astern. The act of the master, in directing the second anchor to be got ready to let go immediately and he be called at once in case the vessel should begin to drag, shows knowledge of the danger. The master with such knowledge took the risk of the ability of the single anchor to hold his vessel, and having lost, must pay the damage.

No fault on the part of the Atlantic contributing to the disaster is shown, and the libellant is therefore entitled to the decree prayed for.

Southern District of New York.

JUNE 1879.

THE TUG E. W. GORGAS.

**PRACTICE—SERVICE OF PROCESS—POWER OF MARSHAL TO DEPUTIZE—
VERIFICATION OF LIBEL—NOTARY'S SEAL—EFFECT OF ADMIRALTY
SALE—JUDGMENT BY DEFAULT—MASTER—EQUITABLE ESTOPPEL.**

Libels were filed against a tug to recover for the loss of three barges while in tow. D. appeared as claimant and owner of the tug and set up that, after the loss in question, the tug was libelled in the District Court of the Eastern District by C. to recover a claim which was a valid lien on her, and that under a decree in that suit by default the tug was sold, and that D. became the purchaser, and that by such sale, the liens of the libellants, if any they had on the tug, had been discharged. The cause coming on for trial and D. having offered in evidence the judgment record in the case of C. against the tug, the libellants objected to it as void for various alleged irregularities, and also offered evidence to prove that D. was master of the tug at the time of the loss of their boats, and also evidence by which they claimed to show that the sale of the tug in the suit of C. was collusive :

Held. That, although the libel in C.'s suit appeared to have been sworn to before a notary public, whose seal was not attached to his certificate, the absence of such seal did not vitiate the process issued on the libel, under the rules of the court requiring a sworn libel previous to the issuing of process against a vessel. Under the statute of 1876, chap. 304, the seal was not necessary to a due verification. At most its absence was only an irregularity, which could not be availed of after decree, in another proceeding before another court :

That the process in C.'s suit was properly served, being served by one T., who had been, by a memorandum endorsed on the process by the marshal, deputized to execute the process :

That neither § 788 of the U. S. Revised Statutes in connection with § 102 of the New York Code of Civil Procedure, nor Admiralty Rule 1 of the Supreme Court required process to be served by the marshal himself or a deputy marshal :

The Tug E. W. Gorgas.

That it would seem that by force of § 788 of the Revised Statutes, which was a re-enactment of §7 of the Act of 1861, chap. 25 (12 Stat. at Large, p. 425), marshals of the United States, have the powers which sheriffs had on the day of the passage of that Act; and if so, the N. Y. Code of Civil Procedure passed in 1877 would not affect such powers;

That the statutes of the United States conferring on marshals similar powers to those exercised by sheriffs, are laws conferring powers only, and not restricting the powers which the marshals already had;

That §102 of the New York Code of Civil Procedure did not take from sheriffs the power of deputizing other persons to serve process;

That it was not essential to the jurisdiction in C.'s suit, that the marshal should continuously retain the vessel in his custody;

That there is no rule or statute requiring the exclusion of Sundays in the fourteen days required before the return of process *in rem*;

That the objections to the jurisdiction of the District Court of the Eastern District in C.'s case must therefore be overruled.

Whether the decree of that court in that case when offered in evidence did not exclude the evidence impeaching the jurisdiction of that court, *quære*.

Held, also, That on the evidence the suit of C. was prosecuted by him in entire good faith, and was not collusive;

That D., although master of the tug and in charge of her at the time of the libellants' alleged loss, was not bound to notify them that C.'s suit was commenced, or that the tug was to be sold under the decree in it; nor was he bound to defend the tug against C.'s claim, which was a valid one, nor was he prevented from buying the tug at the sale, nor was the effect of the sale to clear the tug from all liens lessened by D.'s having bought her at the sale;

That D. was not equitably estopped from setting up the decree in C.'s suit and the sale under it, against the claims of the libellants;

That, if the sale of the vessel had been unfair or for an inadequate price, the libellants, who knew of the sale within two days after it took place, might have sought a remedy by applying to the Court of the Eastern District to set aside the sale and open their default and let them in to defend against C.'s claim, if they had any defence;

That, having failed to do this, their rights as against the tug were cut off by her sale, and their libels must be dismissed.

CHOATE, J. These are three suits brought by the owners of three barges to recover damages for the loss of the barges and their cargoes, alleged to have been caused by the

The Tug E. W. Gorgas.

negligence and mismanagement of those in charge of the steam-tug, while the said barges were with other boats being towed from Port Morris to Bridgeport, Conn., on the 13th of March, 1879. The claimant, George H. Dentz, after answering in each case to the merits, set up as a separate defence, " that on the 19th of March, 1879, in the District Court of the United States for the Eastern District of New York, a libel was filed against said steam-tug by John Collins, to recover \$150, as damages alleged to have been sustained by said Collins, by reason of the running on the rocks off Norwalk, Conn., of his canal-boat, the E. L. Anthony, by said steam-tug; that process on said libel was issued against said steam-tug on said 19th day of March, and was delivered to the marshal of the Eastern District of New York, which said process was made returnable April 2d, 1879; that said marshal attached said steam-tug under said process on March 20th, 1879; that no claim was interposed by any one and said steam-tug was left in the custody of said marshal, and on the return day of said process, no one appearing for said steam-tug, a decree was made by said court, entering the default of all persons and directing a reference to compute libellant's damages, and that a *venditioni exponas* issue to said marshal, and that said steam-tug be sold on six days' notice; that on April 9th, 1879, said writ was issued to said marshal, and after six days' notice of sale duly given, said steam-tug was, on the 17th day of April, 1879, duly sold at public auction by said marshal, and was struck off to this claimant, his being the highest bid therefor; that on the 18th of April, 1879, a bill of sale of said steam-tug was duly executed and delivered by said marshal to this claimant, and was on the same day duly recorded by claimant, in the custom house, in New York city. And said claimant alleges and avers that by said proceedings and sale all liens which

The Tug E. W. Gorgas.

accrued prior thereto against said steam-tug were cut off, and that this claimant took said steam-tug free and clear from all liens and among others free and clear from the lien set forth in the libel herein." This answer having been filed, the libellant was allowed to amend his libel by alleging as follows :

"1st. That no final judgment or decree has been had or entered in the proceedings set forth in the answer of the claimant herein as pending in the District Court of the United States for the Eastern District of New York, wherein one John Collins is libellant and the steam-tug E. W. Gorgas has been attached.

"2nd. That the District Court of the United States for the Eastern District of New York did not have jurisdiction over the steam-tug E. W. Gorgas, at the time its process was served upon and the said steam-tug attached in the suit or proceedings aforesaid.

"3rd. That the claimant herein, if he purchased the said steam-tug, E. W. Gorgas, at a judicial sale, as is alleged in the answer, got no title to the said vessel, exclusive of and hostile to the lien of this libellant, nor is this libellant cut off from asserting said lien in this Court by reason of any matters set up in the answer of the claimant, because, 1st, the said purchaser and claimant had full knowledge of your libellant's lien against or upon said vessel at the time he purchased her; 2nd, He is and should be estopped as to this libellant's lien upon said vessel from setting up his purchase as aforesaid, because by his own acts and declarations he kept this libellant in ignorance of the proceedings of condemnation and sale aforesaid of the E. W. Gorgas for the purpose of deceiving this libellant and of cutting off his lien by a pretended judicial sale; 3rd, The said sale of the steam-tug E. W. Gorgas was fraudulent, because of the gross

SUPREME COURT OF NEW YORK

The People vs. [Name]

... The purchaser, this defendant was induced personally guilty of and responsible for the ... of your libel- ... The proceed- ... and frau- ... with the dishonest ... and the liens of ... was a participant." Upon these findings the case coming on for trial, it was agreed that the issues raised by the defence of the suit in the Eastern District and the sale under it should be first tried. The defendant offered the record and bill of sale returned to in the answer. The plaintiffs objected to the record and the bill under it on the ground that the court had no jurisdiction to make the decree because, 1st, the libel was not properly verified, 2nd, The process based on an unverified libel has no validity, 3rd: The return of the process was not signed by the marshal, 4th: The process was not served by the marshal or a deputy marshal, but by one Tobey, who had no authority to serve it, and that therefore there was no seizure of the vessel so as to give the court jurisdiction: 5th. The process being dated March 19th, was made returnable April 2nd, in less than fourteen days exclusive of Sundays: 6th. That it does not appear by the marshal's return that the vessel was seized within the district: 7th, That after the alleged seizure she was not kept in the custody of the marshal till the time of sale.

It appeared that the libel, which was signed by the libel-
lant, had annexed to it the following certificate "Subscribed
and sworn to before me this 24th day of February, 1879.
Simeon Ford, Notary Public, Kings and N. Y. Cos." The ob-
jection to this is that, as the notary's seal was not affixed, the
court had not before it any competent proof under the laws

The Tug E. W. Gorgas.

of the United States, that the libel was sworn to, the certificate of the notary not being attested by his seal. The practice and the rule of the court require a sworn libel previous to the issue of process against the vessel. (*Martin v. Walker*, Ab. Adm. 581.) By Statute 1876, ch. 304, notaries public are authorized to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United State; take acknowledgments and affidavits "in the same manner and with the same effects" as commissioners of the United States Circuit Court may now lawfully take or do. This statute differs from some prior statutes relating to the same subject, in that it does not in terms require the signature and authority of the notary to be attested by his official seal. (Rev. Stat. § 1778. Stat. 1874, ch. 390, § 20.) Under this statute, while a court of the United States may doubtless make any reasonable rule to ascertain the authenticity of the notary's signature, as by requiring his seal to be affixed or a certificate of a State officer to his appointment and authority as such notary, yet it would seem that any such evidence in addition to his official signature would be required not to make the act of the notary valid, but simply to satisfy the court of the fact that the certifying officer was a notary; and if the court is satisfied with the official signature of the notary, I do not see how any other court can question the regularity of its action. The seal was not necessary under this statute to a due verification, and if the affixing of the seal were the proper and customary mode of proving to the court the notary's official character, the irregularity of the absence of such proof would not vitiate the process. At most it would be a mere irregularity which cannot be availed of after decree, even in case of a judgment by default.

The Tug E. W. Gorgas.

The objection to the jurisdiction chiefly urged, is that the marshal cannot depute a person who is not a deputy marshal to serve a process directed to him to serve. In this case the marshal signed on the back of the process the following endorsement: "I hereby depute C. W. Tobey to execute the within process." Tobey was not a deputy marshal nor in any way a regular employee of the marshal's office. He had no official connection with the marshal, except so far as this attempted deputation established it for this particular purpose, and he was the person employed by the libellant to procure the libel to be filed and process thereon to be issued. He received the process from the hands of the marshal with this endorsement, and the arrest of the vessel and the service of the notice on the master as required by the rules of that Court were made by him. The marshal made return of the process in the usual form as follows: "In obedience to the within monition *I* attached the steam-tug, etc." It is insisted that this was no arrest of the vessel, and that by Admiralty Rule 1, of the Supreme Court, the marshal or deputy marshal alone can, unless in case they are parties in interest, serve the process. That rule provides as follows: "All process shall be served by the marshal or by his deputy, or where he or they are interested, by some discreet and disinterested person appointed by the court." It is also claimed that by force of Rev. Stat., § 788, in connection with Section 102 of the N. Y. Code of Civil Procedure, the marshal or deputy marshal alone can now serve a process out of an Admiralty Court in either of the districts within the State of New York, whatever may be the power of the marshal or deputy marshal in other districts to depute another person to do so. Rev. Stat. § 788 is as follows: "The marshals and their deputies shall have in each State the same powers in executing the laws of the United States as the sheriffs and

The Tug E. W. Gorgas.

their deputies in such States may have by law in executing the laws thereof." And the section of the New York Code referred to, provides that "a sheriff or other officer, to whom a mandate is directed or delivered, must execute the same according to the command thereof, and make return thereon of his proceedings under his hand. For violation of this provision he is liable to the party aggrieved for the damages sustained by him, in addition to any fine or other punishment or proceeding authorized by law. A mandate directed and delivered to a sheriff may be returned by depositing the same in the post office, properly inclosed in a post-paid wrapper addressed to the clerk at the place where his office is situated, unless the officer making the return in the name of the sheriff resides in the place where the clerk's office is situated."

It is argued that by Rev. Stat. § 788, the marshal can exercise no other powers than a sheriff, and that by the Code § 102, the sheriff cannot depute the execution of a writ.

Independently of any rule of court, or statute affecting this particular duty of the marshal or sheriff, it is clear that such an officer may direct a particular ministerial act, with the performance of which he is charged, to be performed by another, acting for him and under his authority and upon his responsibility. Such is the rule of the common law, and among the ministerial acts which such an officer may so depute another to do in his name and for him, is the service of a writ directed to the sheriff. (*Hunt v. Burrell*, 5 Johns. 137.) In that case the under sheriff deputed another person, not an officer authorized by law to serve a writ, to serve a *capias*, and the question was whether acts done by such person could be justified under the writ. The court held that the service was good, and said: "The deputation was a sufficient authorization to the defendant to execute the writ.

The Tug E. W. Gorgas.

The general maxim that *delegata potestas non potest delegari* is correct, when duly applied; for to make a deputy by a deputy, in the sense of the maxim, implies an assignment of the whole power, which a deputy cannot make. A deputy has general powers, which he cannot transfer; but he may constitute a *servant*, or *bailiff*, to do a particular act." And in support of this view the court refer to *Parker v. Kett*, 1 Ld. Raym. 658, and *Leah v. Howell*, Cro. Eliz. 533, and cases therein cited, as showing that the rule is well established at common law. There is no reason why in the absence of restrictive rules or statutes the principle of these decisions should not apply to the marshal or deputy marshal of the United States. Indeed, it is very obvious that they have many duties to perform every part of which they cannot with any convenience to themselves or the public be expected to perform without the aid of other persons; and these authorities are conclusive that there are no reasons of public policy which, independently of rule or statute, except from this class of acts, which such officers may perform by an agent or servant, that part of the service of a monition which consists of the seizure of a vessel under it.

The rule of the Supreme Court quoted above, does not, in my judgment, have any reference whatever to the regulation of what a marshal must do personally, or what he may do through an agent or special deputy. This and the succeeding rules were framed under Stat. 1842, ch. 188, §6, (5 St. at Large, 518,) which authorized the Supreme Court from time to time to prescribe, regulate and alter the forms of writs and other process and other proceedings in the District and Circuit Courts; and so far as the part of the rule, making it imperative on the marshal or his deputy to serve all process issuing out of the courts of the United States, is concerned, it follows what is the clear implication of the statutes of the

The Tug E. W. Gorgas.

United States then existing (St. 1789, ch. 20, §§27 and 28 ; 1 Stat. at Large, 87 ; R. S. §§ 787 and 922), and before the rule was made the Supreme Court had declared this to be duty of the marshal (*Ins. Co. v. Adams*, 9 Peters 603). That part providing for the special appointment by the court of a person to serve the process, in case the marshal or his deputy is a party to the cause, is also taken directly from an existing statute. (St. 1789, c. 20, § 28 ; 1 St. at Large, 87.) It provides that, in such a case, the court shall appoint a disinterested person to do the service which otherwise under the rule the marshal is to do. Undoubtedly, in such a case, the person so appointed would, by the rule, be required to do all that the marshal would otherwise be required to do under the process, not only to arrest the ship, but to keep it in custody, give the notice required by the monition, and make a return of the process to the court, in his own name. And the "serving of process," as used in this rule, includes all these things. The word "deputy," as used in the rule, clearly means a "deputy marshal," an officer known to the law as such, who equally with the marshal may do all that is to be done under the process. It cannot mean, as used in this rule, a person specially deputed to execute a process or arrest a vessel. It would obviously have been absurd for the Supreme Court to provide by rule for substituting some other person by special appointment for an interested person so deputed by the marshal. A deputy marshal is an officer for whose appointment, qualification and removal the laws of the United States expressly provide. (Rev. Stat. §§ 780-782.) That the rule of the Supreme Court now in question has not been understood or construed as restricting the marshal or deputy marshal to a personal performance of this particular duty of arresting a vessel or other act in pursuance of process for the seizure of property, is sufficiently shown by the uni-

The Tug E. W. Gorgas.

form practice of deputing to particular persons, not regular deputies, the execution of such process, as well since the promulgation of this rule in 1844, as before that time. (See *U. S. v. Jailer*, 2 Abb. U. S. Rep. 272.) This rule is to have the same construction with the statutes, whose meaning it was designed to express and embody in the form of a rule; and the words in which the rule is framed do not express nor indicate any intention to prescribe a new or more limited mode of performing the official duties referred to, or any different manner of executing process from that recognized by the familiar decisions of the courts as a proper and lawful mode of service, by such an executive officer.

Rev. Stat. § 788 is a re-enactment of Stat. 1861, ch. 25, § 7, (12 Stat. p. 282,) and that again was a re-enactment of Stat. 1795, ch. 36, § 9, (1 Stat. p. 425.) This section of the Revised Statutes differs from these earlier statutes only in the substitution of the words "may have" for the word "have." But for the circumstance that the Revised Statutes is expressly declared to be the re-enactment of laws already in force, this change of phraseology might be construed as conferring on marshals, within the several States, such powers in executing the laws of the United States as by the laws of the same State are from time to time conferred upon sheriffs to execute the laws of the State, making the provision perambulatory; whereas the previous Acts had apparently conferred on marshals powers of sheriffs in the like cases as existing at the dates of the said Acts respectively. The change of phraseology in this case seems hardly sufficient, however, to overcome the presumption against an intended change of construction in the re-enactment of the statute of 1861, and it would therefore seem that the marshals have, by force of this statute, such powers as sheriffs had on the 29th day of July, 1861, the date of the passage

The Tug E. W. Gorgas.

of the last named Act of Congress. If this view is correct, a restrictive State statute passed in 1877, as the Code of Civil Procedure was, cannot affect the question or be deemed to control or take away any power of the marshal conferred by the Act of 1861. But whether the foregoing construction of these laws is correct or not, (and the questions may be regarded as disputable), there are two other answers to the present objection to the power thus exercised by the marshal. The first is, that the statutes of the United States above cited, conferring on marshals similar powers to those conferred on sheriffs by the State laws, are to be construed as laws conferring powers only, and not as laws restricting or taking away from the marshals any powers already vested in them according to the laws of Congress and the rules and practice of the courts, and these statutes cannot be construed as if they provided that the marshals shall, in the execution of the laws of the United States, have *only* those powers exercised by sheriffs. Not only are these statutes in form simply empowering and not restrictive Acts, but the general purpose and objects of the Acts of Congress, of which they constitute parts, are inconsistent with such a restrictive construction. Both the Acts, that of 1795 and that of 1861, were Acts passed for the suppression of insurrection and rebellion against the United States. It was not within the purview of such statutes to take away or limit the powers of important executive officers of the United States, however much it was consonant with their general purposes to enlarge those powers. Moreover, there would be such practical inconveniences, and even dangers to public interests, in putting the powers of these Federal officers under the regulation of the State Legislatures, as a restrictive construction of these Acts would do, as to forbid such construction, unless clearly a necessary one. It is, therefore, immaterial

The Tax E. W. Gorman.

whether by the laws of New York sheriffs can now, or in 1861 could, make such a deputation for the service of writs, since, as shown above, the marshals of the United States have, independently of any powers conferred on them by these particular statutes, the power to do so. The other answer to the objection is, that the State Statute itself (Code § 102) seems not to take away from sheriffs the power of deputing other persons to execute process, recognized by statute and the decisions of the courts of New York as an existing power of sheriffs. 1 N. Y. Rev. Stat. p. 379, § 73, which provides that "persons may also be deputed by any sheriff or under-sheriff by an instrument in writing to do particular acts," has never been expressly repealed. The term "particular acts," clearly includes the service of writs. (*Hall v. Fisher*, 9 Barb. 25; *Hunt v. Burrell*, *ut supra*.) Indeed, the language of section 102 of the Code of Civil Procedure, relied on as importing that the sheriff or deputy-sheriff must *personally* serve all process, to wit: "A sheriff or other officer to whom a mandate is directed and delivered must execute the same according to the command thereof, and make return thereon of his proceedings under his hand," is simply a re-enactment of 2 Rev. Stat. p. 440, § 77, which provides that "every sheriff or other officer to whom any process shall be delivered shall execute the same according to the command thereof, and shall make due return of his proceedings thereon, which return shall be signed by him." This provision seems first to have appeared in the Revised Statutes of 1828, and has been in force ever since. The changes of phraseology in the Code are merely verbal, and do not indicate a purpose to require the service to be made by the sheriff personally. Moreover, this section, so far as it imposes the duty of serving all process on the sheriff or deputy-sheriff, was implied in 1 Rev. Laws of 1813, p. 423, § 10, and

The Tug E. W. Gorgas.

that same statute recognized the power of the sheriff to appoint another person, containing the following provision: "That no person who shall be deputed by any sheriff to do a particular act only, shall be required to take the oath to be taken by the deputies of sheriffs." (1 Rev. Laws 1813, p. 421, § 5.) The same Act also provides (p. 423, § 11) that in case resistance is made to any process of execution, the sheriff, "laying aside all other things and taking with him the power of the county, shall forthwith *go in his proper person* and do execution." This alone would strongly tend to show that in all other cases the sheriff is not required to go in his own proper person for the service of process. At any rate, the existence on the statute book from so early a time of these two provisions, one requiring the sheriff to execute all process, and the other empowering him to do a particular act through a deputy specially appointed in writing therefor, together with the judicial construction that has been put upon the latter provision as applicable under the statute to the service of process, is conclusive that section 102 of the Code has not the force contended for in this case. And it follows that under U. S. Rev. Stat. § 788, the marshal can make such a special deputation, because under the laws of New York the sheriff can do so. The construction, so clearly to be applied to these statutory provisions of the State of New York, also tends strongly to confirm the views above expressed as to the proper construction of the similar provisions in the statutes of the United States and the rule of the Supreme Court.

The other objections to the record are not tenable. It is not essential to the jurisdiction that the marshal should continue his custody of the vessel. (*The Rio Grande*, 23 Wall. 463.) After decree certainly the act of the marshal will so far be presumed to be regular that the seizure will be pre-

The Tug E. W. Gorgan.

sumed to have been made within his district, there being nothing to show the contrary. There is no rule or statute requiring the exclusion of Sundays in computing the fourteen days allowed for the return of process. The objection to the signature of the return is not sustained by the evidence. The objections to the jurisdiction must therefore all be overruled, and it is unnecessary to examine the question raised by the claimant's counsel whether the decree itself, importing the judgment of the court upon these several questions and a finding of the facts in favor of the jurisdiction, does not exclude all evidence impeaching the jurisdiction on these several grounds.

It remains to consider whether the alleged fraud and collusion constitute any ground on which, in this suit, the decree or the title made under it can be attacked.

As regards the allegations of fraud in procuring the title of the claimant under the decree, the averments of the amended libel are not sufficiently certain to make it proper to dispose of the issue on the offers of proof already made. There is a considerable weight of authority for the claim that even a domestic judgment *in rem* may be treated as a nullity when made the basis of a claim or defence by one who has procured it by means of a fictitious case imposed upon the court, or even by means of a case not in itself fictitious but used not for the benefit of the apparent plaintiff, but collusively with him for the benefit and defence of the party apparently hostile to him, and with a purpose on his part to injure or impair the rights of the party against whom the judgment is sought to be now set up as a bar. (*Borden v. Fitch*, 15 Johnson 145; 2 Smith's L. Cases, 7th Amer. ed. p. 823. See also *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 604; *The Storm King*, unreported; *Girdlestone v. Brighton Aquarium Co.*, L. R. 3 Exch. Div. 137 and S. C. on App.) Whether,

The Tug E. W. Gorgas.

however, the libellants' case can be brought within this principle and what are the proper limits of the principle itself, may more properly be left to be determined when the libellants have produced all their evidence tending to show fraud and collusion.

The cause will stand for further hearing on the issue of fraud and collusion.

Evidence having been taken on that issue, the court rendered the following opinion:

CHOATE, J. The testimony having been now taken bearing on the questions of fraud raised by the libellants in impeachment of the title under the marshal's bill of sale, set up in the answers of the claimant, it is evident that no case is made out by the libellants for holding that the suit of Collins against the E. W. Gorgas was a fictitious suit or was procured to be commenced or carried on by the consent or with the connivance of libellant therein, for the benefit of any other party than himself. So far as the libellant Collins is concerned, the suit was prosecuted in good faith, for the purpose of collecting what he believed to be a valid claim, and all the steps taken in his name and behalf in the progress of the cause were taken in pursuance of his directions given to his proctors and the agent employed by him to collect the claim. It is, however, now insisted that the claimant George H. Dentz has been guilty of such a fraud towards the libellants in respect to said suit, and the sale of the tug under the decree therein, that he is estopped to deny their liens as still existing, notwithstanding the sale of the boat to him under the decree. It is also claimed on their behalf that a sale under a decree of an admiralty court to one who was the former owner of the vessel does not cut off

The Tug E. W. Gorgas.

the prior liens created through the acts or contracts of such owner, and that the same principle makes the title of the claimant, who was the master of the tug and representative of the owner at the time when the libellants' liens, if they ever had any, attached, subordinate to their liens. And it is insisted that the rule applies to such a case that the same person cannot be both vendor and vendee.

As regards this latter point, it seems to me enough to say that a sale of a vessel by a Court of Admiralty, if properly subject to its jurisdiction, is a sale of the thing itself and not a transfer of anybody's title to it. A transfer by the marshal under the decree becomes a new and independent source of title, and all rights in and liens upon the thing sold are transferred and attach to the proceeds in the possession of the court. It differs essentially from a sale *inter partes* and from other judicial sales where the court undertakes to deal with and transfer only the interest or title of particular persons, parties to the suit before it. And there is no reason of public policy which incapacitates a former owner from buying at an admiralty sale on the same terms as regards the title he acquires with all the rest of the world. Indeed, sales in admiralty are so often submitted to, in practice, for the purpose of disentangling the title to the vessel from embarrassing claims and liens, and vessels so sold have been so frequently purchased by their former owners that this point, if valid, must long ago have been raised and sustained. There is no question that the former owner may buy and all existing liens will be cut off by the sale. Nor does this claimant stand in any worse position as a purchaser than any other person because he was master of the tug at the time libellants' boats were lost. Their claims against the tug, if any, are based wholly on the negligence of those in charge of the boat at the time of the disaster. He was then the master and presump-

The Tug E. W. Gorgas.

tively the negligent party, if negligence shall be proved. But this fact does not establish any relation of trust and confidence between him and them such as to make it improper for him to become a purchaser with all the rights of any other purchaser.

The point of an equitable estoppel is, however, now chiefly relied on by libellants' counsel. The circumstances insisted on as creating this estoppel are, that the claimant being liable personally, as master of the tug, to the libellants for their claims, suffered the proceedings in the Collins suit to go on to a condemnation and sale, when he might have defended it, or might have settled the claim; and kept the libellants in ignorance of the proceedings till after the sale, misleading them through promises of payment which he did not intend to perform, so that they deferred libelling the boat till after the sale, whereas but for such promises they would, it is claimed, have libelled her before the sale, and would have discovered the pendency of the Collins suit, appeared therein and contested the claim, or attended the sale and given or procured to be given a higher price; that by these means and other practices designed to secure secrecy, they were prevented from getting information of the sale and so of protecting their interests by bidding at the sale; that these other practices were chiefly the procuring of the sale to be made at an unusual place and the procuring of the consent of the marshal that pending the sale, no keeper should be put on board, and that the boat should remain in the possession of the claimant, making its usual trips about the harbor and in Long Island Sound.

No case for the application of the doctrine of equitable estoppel is made out against the claimant. He was not under the slightest obligation to inform the libellants of the pendency of the suit of Collins, or of the sale which was about to take

The Tug E. W. Gorman

place. He had a perfect right to allow the claimants use of it in a decision and sale, even if he might have settled it. It was not an act of bad faith toward other persons having liens on the tug. If he did so with the intention of getting the value of their liens. There is no proof that the claim of Gorman could have been successfully defended. The arrangement with the marshal for disposing with a keeper seems to have been made from merely economical considerations. It was merely being given to the marshal that the tug would be produced at the time and place fixed for the sale if the suit was not settled. The place of sale was a proper place. In the absence of any established or usual place for marshal's sales. Some inadequacy of price is shown, and it is probable that upon a resale and with extraordinary efforts to obtain purchasers the tug might bring from a thousand to fifteen hundred dollars, instead of five hundred and fifty dollars for which she was bid off by the claimant. The alleged promises of the claimant to pay libellants' claims are denied by him and do not seem probable under all the circumstances of the case, but, if made and if they were designed on the claimant's part to lull the libellants into a false security so that they forbore taking measures against the tug which would probably have led them to a discovery of the impoundment, and it is not shown that by reason of these promises even in this indirect way they have lost their liens, or that they have suffered any damage as lienors which could not and would not, on their application in that suit, have been recovered. No misstatement of fact was made or is claimed to have been made to them by the claimant. Their liens are cut off by operation of law, by regular proceedings of a court of competent jurisdiction in a suit to which they and all the world having any claim on this vessel were parties. If their interests have been unduly sacrificed and

The Tug E. W. Gorgas.

their default in not appearing was excusable, that court had full power on their application to give them relief. No other court can so well give the relief to which they may be entitled. It is said that the claimant has obtained his title through this fraud. If it be in any sense a fraud, it is not true that the claimant obtained his title through or by means of it, but he did obtain his title through the judgment and decree of the court. It does not satisfactorily appear that if what is called his fraud had not existed, the claimant would not equally and on the same terms have obtained the same title. To hold that the liens of the libellants are not cut off would be to put them in a better position than they were in before the alleged wrong, when their claims were subordinate to that of Collins, and would virtually be setting aside the decree and proceedings of the District Court in the Eastern District by reason of alleged improper practices of one party to a suit in that court towards another party to the same suit. It would be inflicting a punishment for fraud without regard to the damage caused by the fraud. The libellants might have applied to the court for leave to contest Collins's claim at any time before the distribution of the fund in court, the proceeds of the vessel, and it appears that they knew of the proceedings within two days after her sale. If the sale was unfair, or for a grossly inadequate price, or would have been for a higher sum if they had had actual notice of it, they could have applied for a re-sale. But they have suffered no legal damage in not having an opportunity to buy the tug in themselves.

It is a general principle applicable to equitable estoppels, that equity will not carry them beyond indemnity to the party who has been misled. The only deceit which can be claimed to have been made out in this case is that by his acts and declarations the claimant led the libellants to un-

THE END

And it is not to be overlooked that the claimant may have done to mislead the libellants, they had all the notice of that suit which the law in like cases gives to lienors, and that they are in any view parties in default, and it cannot be complained, therefore, on their behalf that their application to that court for relief would necessarily be granted on terms usual in cases of default.

I do not think that the acts and declarations of the claimant were such as to amount to a statement by him to

The Tug E. W. Gorgas.

the libellants that there was no such suit pending; but if it were, while it would constitute a strong case for relief in that court, it would not, in my opinion, justify the application of the doctrine of equitable estoppel for two reasons: *first*, because an estoppel is raised only where it is necessary to prevent a loss or injury resulting from the reliance on the statement of the party estopped, and it is not so necessary if in the suit to which the statement refers he has or is entitled to full relief; and *secondly*, because an estoppel is applied only to the extent required for the indemnity of the party deceived, and to hold the claimant's new title, as is contended for, subject to the libellants' liens without regard to the antecedent rights and liens to which they were subordinate, and which have been cut off by the decree and sale, would carry the estoppel far beyond such rule of indemnity.

The defence is sustained and claimant is entitled to decrees dismissing the libels.

For libellants McGovern and Joice, *E. D. McCarthy*.

For libellant Harrigan, *W. R. Beebe and F. A. Wilcox*.

For claimant, *R. D. Benedict*.

The Steamship Acadia.

JUNE, 1879.

THE STEAMSHIP ACADIA.

MARSHAL'S COSTS.—BONDING VESSEL.

A vessel was seized by the marshal under a monition and thereafter was released on a stipulation for her appraised value :

Held, That the marshal was not entitled to a commission on such appraised value under § 829 of the Revised Statutes of the United States.

CHOATE, J. This is an appeal from taxation of the marshal's costs. The suit was for damages caused by violation of charter party, and the amount of damages claimed was \$25,000. The vessel was seized by the marshal under the monition and has been released on stipulation for her value, being appraised at \$3,000. The marshal claims that he is entitled to a commission on the valuation of the vessel under Rev. Stat., § 829, which gives the marshal "when the debt or claim in admiralty is settled by the parties without a sale of the property," a commission of one per cent on the first five hundred dollars of the claim or decree, and one-half of one per cent on "the excess of any sum thereof over \$500.00," "provided that when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof." It is urged on behalf of the marshal that the design of the statute was to give the marshal a commission for his responsibility in attaching and holding the property, in all cases where there is a sale $2\frac{1}{2}$ per cent on the first \$500, and $1\frac{1}{2}$ per cent on the excess, as expressly provided in another part of the fee bill, and in all other cases, that is, where the parties make such disposition

The Steamship Acadia.

of the case that there is or can be no sale by him, one per cent on the first \$500, and one-half of one per cent on the excess. It is argued that the marshal's compensation cannot have been intended to be dependent on the result of the suit ; that this would be against public policy, committing the marshal in all cases to the interest of the libellant, and this argument is urged as a reason for the construction contended for. But I think it is clear that what the statute had in view was a *final disposition of the cause* by agreement of the parties, whereby the suit should be withdrawn or a decree entered without a sale of the property, and does not refer to a case where the vessel is bonded by the claimant without any settlement of the debt or claim. The words of the statute cannot even by a forced construction have the meaning claimed for them in behalf of the marshal. Nor is there any force in the supposed reason of public policy urged in support of his claim. Whatever mischiefs may arise, from having the marshal interested in the result of suits in admiralty, undoubtedly exist under the fee bill as it is, independently of this particular provision. If the marshal attaches a vessel and holds her in custody till the cause is heard, as he may do and often does, and the libel is dismissed, the marshal has no commission under the fee bill. This consideration of public policy, therefore, cannot have been regarded as one so controlling that the language of the fee bill must be forced to conform to it. It was thought, however, reasonable in providing for the marshal's fees to secure him some comparatively small commission where the parties, by agreement, settle the claim without proceeding to a sale. There is nothing to show that the design was to extend this provision beyond the case thus clearly provided for. If it be true that the risk and responsibility of the marshal is the same, where the vessel is bonded and the suit

NEW YORK.

Distilled Spirits.

by the parties and the
he has the same or
the vessel is attached
of the suit, and the
no commission. Fee
giving in every pos-
vice rendered. They
tremely artificial, but de-
sire a fair compensa-

after become entitled
er settled or a decree
tled to nothing. (*The*

1857
JAMES W. KELLEY
100 N. 3RD ST., NEW YORK.

PERSONAL PROPERTY UNDER

charging that certain distilled
ed and in the possession of
old and removed in fraud of

The United States v. 16 Barrels of Distilled Spirits.

the internal revenue laws and with design to avoid payment of taxes thereon, and claiming the forfeiture of a large number of other articles of personal property found in the same place :

Held, That under that section it is not necessary, in order that such other personal property be forfeited, that raw materials intended to be used in the manufacture of articles subject to tax should be found in the same place.

The case of *U. S. v. 33 Bbls., etc.*, 1 Low. 239, disapproved.

CHOATE, J. This is a motion for a new trial after verdict for the plaintiffs. The information was under Rev. Stat., § 3453. It charges that the 16 barrels of distilled spirits seized were articles on which taxes were imposed, and were found in the place mentioned, in the possession of persons unknown, for the purpose of being sold and removed in fraud of the internal revenue laws, and with design to avoid payment of taxes thereon. It claims the forfeiture of said spirits and a large number of other articles of personal property found in the same place. A claim was interposed for the personal property other than the spirits, and upon the trial it was insisted, and now upon this motion it is insisted, that under that section of the Revised Statutes there can be no forfeiture of this personal property because it was not alleged or proved that any "raw materials" intended to be used in the manufacture of articles subject to tax were found in the place. The argument of the claimant is that the words "articles or raw materials" do not refer to the words "all goods, wares, merchandize, articles or objects," but only to the words "all raw materials found in the possession of any person intending to manufacture the same into articles." But the proper antecedent of the words "such articles" is the words "all goods, wares, merchandize, articles and objects." These things before enumerated are here described under the general term "articles." There is no other sensible construction of the language nor anything

The United States v. 16 Barrels of Distilled Spirits.

else to which the term "such articles" can be held to refer with any regard to the grammatical meaning of the words. The words refer to something before mentioned in the section and are called articles as being "*found*" in the place. They cannot refer, therefore, to "articles" which might be in the future manufactured out of the raw materials found in the place, but which are not now found there. "Such articles" cannot, therefore, mean the articles which it is intended to manufacture out of the raw materials. The construction given to the section in this respect is that which it has uniformly received in this court and in the Circuit Court in this circuit. (*A Quantity of Distilled Spirits*, 3 Ben. 79, 80; *United States v. Quantity of Tobacco*, 5 Ben. 134; *United States v. Distillery at Spring Valley*, 11 Blatchf. 262.) The construction is perhaps obscured by a change in punctuation made in the re-enactment of the law in the Revised Statutes, but it is evident that there was no change of meaning intended. In the original statute there is no full stop after the words "shall be forfeited to the United States," as there is in this section of the Revised Statutes. (13 Stat. at Large, 240.) It is further objected that the personal property subject to forfeiture under this section is only such personal property other than "tools, implements and instruments" as are in some way connected with the intended illegal sale or removal of the taxable articles or with the intended illegal manufacture of such articles from the raw materials; and the case of *United States v. 33 Barrels of Spirits*, 1 Low. 239, is relied upon as authority for this limitation of the words "other personal property whatsoever." While that decision sustains the point taken by the counsel for the claimant, I think it is in conflict with the views expressed in this district and circuit in the cases cited above. It seems to me, also, that the possible consequences of great

The United States v. 16 Barrels of Distilled Spirits.

hardship and injustice that might result from giving the words "other personal property whatsoever" their full and proper meaning, upon which the restrictive construction adopted by Judge Lowell is at least to a considerable extent based, namely, that in the case of a building occupied by many different and independent occupants personal property of enormous value in the possession of persons having no connection whatever with the proscribed articles or raw materials might become forfeited without any fault on their part, do not necessarily result from the construction giving the words "other personal property whatsoever" their full meaning. To be forfeited they must be in the "building or place" where the proscribed articles or raw materials are found. The word "place" seems here to refer to a place less than a building or to a part of a building, as well as to a place other than a building or part of a building. There appears to be a reference to the "place" where the person who has in his possession the guilty articles has also other personal property. Therefore, the statute may be read as providing that all other personal property in the same building or the same place other than a building, occupied by the person or persons having the possession in such building or other place of the prohibited articles, shall be forfeited. It seems to me that this limitation of the language is much more in accordance with the spirit of the statute than that suggested by Judge Lowell, and that it avoids all forfeitures which are not clearly within the purpose of the internal revenue laws. Those laws are very severe in declaring forfeitures as against violators of the law, and it is entirely consistent with their spirit and provisions in other respects that all the personal property found in the same occupation with the proscribed objects should be forfeited, subject, of course, to the power of remission vested in the Secretary of the Treasury in case

The Tug John Cooker and the Barge James W. Eaton.

the property of innocent persons should, by some mischance, be included in the forfeiture. The case of *United States v. Locomotive Boiler*, decided in the Eastern district, has no bearing on this case. The demurrer to the information in that case was properly sustained because it did not allege the finding either of articles on which taxes were imposed, etc., or raw materials.

Motion denied.

For the United States, Assistant U. S. District Attorney
E. B. Hill.

For the claimant, *E. T. Wood.*

Eastern District of New York.

JUNE, 1879.

THE TUG JOHN COOKER AND THE BARGE JAMES W. EATON.

COLLISION IN EAST RIVER.—TUG AND TOW AND FERRY-BOAT.—COURSE IN
MIDDLE OF RIVER.—PRACTICE.—STIPULATION FOR VALUE.—MOTION FOR
RE-HEARING.—EVIDENCE.

A boat of the Brooklyn Annex line running from Jersey City to Fulton street, Brooklyn, came in collision with a barge in tow of a tug coming down the East River just outside of the piers. As a consequence of the collision the ferry-boat sank, and suit was brought for damages; the same person appeared as claimant for both tug and tow when they were both

The Tug John Cooker and the Barge James W. Eaton.

libelled, and gave a single stipulation for value to stand for both vessels, by consent :

Held, That the tug and tow were in fault, and, under the practice adopted in giving a single stipulation for both, it was not necessary to decide which of them was in fault, if only one ;

That it was negligence in the tug and tow to pass so close to the piers and contrary to the statute of the State in regard thereto ;

That it was negligence for the tug to take her tow between the ferry-boat and a boat of the Fulton Ferry as she did, when any swing of her tow in passing would have rendered a collision with one or other almost certain ;

That no fault of the Annex-boat contributed to the collision ;

That she was not in fault in coming out from her slip after the collision, in an attempt not to sink in a crowded slip, but to reach Jersey City, which failed because her pumps would not keep her free, those in charge having examined the injuries and being of the opinion at the time that she could be kept up ; the effort was under the circumstances laudable and cannot be held to have increased the damage.

On motion for re-hearing, on the ground that since the trial libellant's witnesses testified differently in another action* growing out of the same collision :

* *Motion denied.*

BENEDICT, J. This action is brought to recover the damages caused to the steamboat J. A. Stevens by a blow from the barge James W. Eaton, delivered on the 15th day of June, 1878, off the Fulton Ferry slip, on the Brooklyn side of the East River. The barge was at the time being towed on a hawser by the propeller John Cooker. The action is against both the barge and the tug, and it appears from the answer that the same claimant has claimed both the vessels, and by consent has given a single stipulation for value to stand in place of both vessels. Under such circumstances, the tug and the tow must be treated as a single vessel, and any decree that may be rendered for the libellant will take effect upon the stipulation for value, whether the collision in question arose from the fault of those on the

*See *The C. F. Starin*, *infra*, p. 494.

The Tug John Cooker and the Barge James W. Eaton.

tug or those on the tow. The practice adopted renders it unnecessary, therefore, to determine which of the two vessels proceeded against, if either, was guilty of fault.

Upon the evidence it is clear that the collision was caused by fault on the part of the tow, and not by any fault on the part of those in charge of the Stevens. In the first place, it was a fault in the tow to attempt to pass down the river close to the Brooklyn shore as she did, instead of keeping near the centre of the river as she might have done and as the statute of the State requires. I am aware of the temptation that impels to a violation of this statute at this locality, and that such violations constantly occur, but a disregard of this statute has never been sanctioned by the courts. There are few places in the whole East River where a departure from the statute is attended with so much risk of loss, not only of property, but of life, and where obedience to the statute is more necessary.

But aside from her violation of the statute, the tow was in fault for attempting as she did to pass between the Stevens and the ferry-boat Hamilton. The space was narrow and a collision almost certain if any drift or swing of the barge should occur during the passage. The tow took the risk of effecting the passage without drift or swing, and failed. Having attempted to accomplish a hazardous manoeuvre, she must bear the consequences of her want of success.

No fault conducing to the collision is proved against the Stevens. The fault charged against her is that she started up her engine while the tow was passing and so ran into the barge then seen to be crossing ahead of her. The weight of the evidence, however, disproves the charge. No movement on the part of the Stevens conduced to the accident.

There remains to be determined another question relating to the action taken by those in charge of the Stevens

The Tug John Cooker and the Barge James W. Eaton.

after the collision with the John Cooker and her tow. The Stevens was at this time running as an "annex boat," and was bound to the Annex dock next to the Fulton ferry slip, on the Brooklyn side. After the collision in question, she proceeded to the Annex dock and landed her passengers, then, after an examination of the injury, she put out into the river, under the supposition that with her engine working, her pumps would keep her afloat until she could reach a place of repair, or, if not, that she could be beached upon the Jersey shore or upon Governor's Island. Soon after she got into the stream it was found that the pumps would not keep her afloat, and she was in danger of sinking at once; therefore she then turned to reach the shore and succeeded in reaching Martin's dock, where she shortly sank in 30 feet of water.

An effort was made to show that under the circumstances it was negligence for the Stevens to leave the Annex dock and that her bow could have been run upon the shore at the bulkhead next the Annex dock, in either of which cases it is supposed the loss would have been much less than it was. But manifestly it was incumbent upon the owner of this boat if possible not to allow her to sink at the ferry dock or in the slip. The crowded condition of the dock and piers and the obstruction caused by a sunken steamboat, justified taking some risk in order to get the boat to a place where she could properly be beached. Whether her pumps would keep her free when her engine began to move could not be certainly known until the effort was made. Those on board thought the condition of the boat warranted taking the risk, and they took the risk themselves with the boat. The result proved that the pumps could not keep her free, and when that was ascertained, she was taken to the nearest place available, where she sank. There is no reason to suppose

JUNE, 1879.

THE PROPELLER C. F. STARIN.

COLLISION IN EAST RIVER.—DAMAGE WHILE IN SINKING CONDITION.

Where a ferry-boat, already in sinking condition from collision with another boat, in attempting to go into her dock, came in collision with a canal boat in tow of a tug, and afterwards sank :

Held, That as the sinking condition of the ferry-boat was an inevitable result of the first collision, and the loss which resulted was not increased by the second collision, the question whether the tug or the ferry-boat was in fault was immaterial.

BENEDICT, J. The evidence shows that the steamboat Stevens having been damaged in a collision with the John Cooker and her tow, left the Annex dock at Brooklyn, leaking badly, for the purpose of getting to a place of safety, if possible, and if not, to the beach at the Jersey shore or Governor's Island. After she was in the stream it was found that her pumps could not keep her free, and that she would necessarily sink, and accordingly she turned to get to a dock. In the effort to reach the dock she came in collision with a canal boat in tow of the propeller Charles F. Starin ; she was in a sinking condition at the time. The injury she had already received in the collision with the John Cooker was of so serious a character as to render it impossible to keep her afloat. While it may doubtless be true that some wood was broken, and perhaps the leak increased by the collision with the canal boat in tow of the Starin, that collision did not prevent her from reaching the docks, nor materially increase the libellant's loss. His loss would have been precisely the same, if there had been no second col-

The Steamship John Bramall.

lision, for his boat would have been sunk just as she did sink. Under such circumstances the libellant can recover nothing of the Starin, and the question whether the second collision was caused by the fault of the Starin or of the Stevens becomes an immaterial one. The libel is accordingly dismissed, with costs.

For libellant, *W. W. Goodrich*.

For claimant, *Peter Cantine*.

JUNE, 1879.

THE STEAMSHIP JOHN BRAMALL.

LIMITATION OF LIABILITY UNDER STATUTE AND UNDER GENERAL MARITIME LAW.—LIMITATION IN ADVANCE OF LIBELS.—JURISDICTION.—PLEADING.—DEFECT OF LIBEL.—PRACTICE.—MONITION.—APPOINTMENT OF TRUSTEE.—REFERENCE.*

An English steamship, the J. B., loaded with guns and munitions of war for the Turkish Government, and bound from New Haven to Constantinople, went ashore on Little Gull Island at the mouth of Long Island Sound, and became a total loss. Some wreckage was saved from the vessel, and most part of the cargo, which went back damaged to the consignors. The owners of the vessel, no action for damages having been begun within six months, made petition for limitation of their liability to the value of the vessel and freight, offering tender of the vessel and her wreckage in their hands. An order was thereupon issued by the court, directing all parties interested to appear, and show cause why an appraisal of the vessel should not be ordered and why the petitioners should not have the relief which they asked. Notice of the order to show cause was published, and on the return-day some of the consignors and the insurers appeared specially to oppose the petition, and objecting to jurisdiction :

* See note at page 511.

The Steamship John Bramall.

Held, That the ship-owners were not entitled to the benefit of the rule of the general maritime law limiting the liability of the ship-owners to value of the vessel and freight, but were entitled to the benefit of the statute of the United States, (Rev. Stat. §4283, 4284), though no action was in this case yet instituted against the ship *in rem* or the owners *in personam* to recover for the losses caused by the stranding; and that the court had jurisdiction of the proceeding;

That, the stranding having occurred within the territorial limits of this district, within which also the wreckage is, and no suit having been instituted in any other district, this proceeding was properly instituted in this court;

That the libel should be amended so as to show the residence of the libellants, whether this be considered a proceeding *in rem* or *in personam*, under the 23d admiralty rule, but could not be held defective because it asked alternative relief, in a case like this;

That the tender, made in the libel of the vessel and wreckage to be disposed of by the court, was an abandonment such as the law requires;

That the court had power under the statute and the rules of the Supreme Court, to direct the marshal to take property into his custody; whether it had power to order a sale by the court, *quere*.

BENEDICT, J. This is a proceeding to obtain at the hands of this court a limitation of the liability of the owners of the steamer John Bramall, for losses caused by the stranding of that steamer at Little Gull Island, on the 18th day of October, 1878, to the value of said vessel and her freight.

The libel avers, among other things:

That at the time of the said stranding the steamer was bound on a voyage to Constantinople, Turkey, with the following cargo, to wit: 15,790 cases of shells, 10,500 cases of bullets, and 3 boilers with 35 pieces of fixtures, all shipped by the Winchester Repeating Arms Company, of New Haven, Connecticut, to be delivered to order at the said port of Constantinople; and 1,604 cases of guns and 840 cases of sabre bayonets, all shipped by the Providence Tool Company of Providence, Rhode Island, to be delivered to order at the said port of Constantinople: That there were no pas-

The Steamship John Bramall.

sengers on board the said steamer, and she carried no cargo except that hereinbefore mentioned :

That at the time of stranding as aforesaid, and in consequence thereof, the steamer immediately filled with water : That the master secured the assistance of experienced wreckers to save the said cargo and steamer, and caused the greater portion of the cargo shipped by the Winchester Repeating Arms Company to be transported from the steamer to New London and to be there stored, and delivered the cargo shipped by the Providence Tool Company to the owners thereof :

That afterwards, on the 4th day of February, 1879, that portion of the cargo shipped by the Winchester Repeating Arms Company was claimed by the owners thereof, and was delivered to them : That no freight has been paid or demanded for the carriage or transportation of any of the goods before mentioned : That the means adopted by the master for the preservation of the cargo were prompt and efficient, but that, nevertheless, the said cargo was, as your libellants believe, greatly damaged : That all endeavors to save the said steamer were unavailing, and she never finished her voyage, but remained where she stranded, and finally broke to pieces and became a total wreck, though some of her tackle and furniture was, by the exertion of the master and crew, assisted by the said wreckers, saved and safely landed in this district, where it now is :

That no claim has been made against the said steamer or against the libellants for damages occasioned by the said stranding, and the libellants do not admit that any just claim for damages from the shippers or owners of the said cargo, or from any one, exists against them or the said steamer by reason thereof, but allege that the said damages, if any there were, were occasioned solely by the dangers and perils of

The Steamship John Bramall.

the seas and navigation, and not by the fault or negligence of those in charge of and navigating the said steamer; and they further allege that whatever loss, damage or destruction of any of the said property, goods or merchandize shipped or put on board of said vessel, or whatever loss or damage has been done, occasioned or incurred by reason of the stranding and wreck aforesaid, has been done, occasioned and incurred without the privity or knowledge of the libellants and petitioners, or any of them :

That as the libellants are informed and believe, by the general maritime law and by sections 4283 and 4284 of the Revised Statutes of the United States, their liability, if any, for loss, damage or injury by reason of said stranding is limited to their interest in the said steamship and her freight, and that upon their surrendering the said vessel, as she lies, and the freight earned, or giving stipulation for the value thereof in this court, they are entitled to the benefit of the law limiting their liability as aforesaid, and to this end the libellants offer and tender such stipulation as to this court shall seem fit.

Wherefore the libellants pray that in case it should be hereafter found that there is any liability upon the part of said steamship or upon the libellants as owners thereof for damages occasioned by the stranding and wreck aforesaid, which liability they do not in any manner admit but expressly and wholly deny, that they may have the benefit of the aforesaid limitation of liability under the general maritime law, and also of the limitation of liability provided for in and by sections 4283 and 4284 of the Revised Statutes of the United States, and that the total amount of such liability, if any, and of any recovery which can be had thereon, shall not exceed the amount or value of the interest of the libel-

The Steamship John Bramall.

lants as owners in said steamship at the time of said loss and in her pending freight :

And that this court would make an order for the sale of said steamship or for the appraisement of the amount or value of the interest of the said libellants in said steamship at the time of the loss and damage aforesaid, and in her pending freight, and for the payment of such amount into court, or for the giving of a stipulation with sureties for the payment thereof into court whenever the same shall be ordered, and will otherwise order and direct what shall be done by the libellants in this suit in order to secure and have the benefit of the law limiting their liability as in this libel alleged, according to the maritime law and the course of proceedings of courts of admiralty; and upon compliance by the libellants with such order, that a monition may be issued against all persons claiming any damages or any recovery against said steamship or her owners, citing them to appear before this court and make due proof of their respective claims and the amount thereof, if any such claims they have, at or before a certain time by this court to be named in said writ, and that such further notice be given as this court may direct, and if any liability be found to exist, the court would apportion the sum for which the libellants may be liable among the parties entitled thereto, and that an order may be made to restrain the prosecution of all and any suit or suits against said libellants or against said steamship in respect of any such claim, as is provided by the rules and practice in admiralty; and that the libellants may have such other and further relief as to this court shall seem meet, with costs to be taxed.

Upon the filing of the libel an order was made as follows :

The Steamship John Bramall.

“On reading and filing the libel and petition of The Royal Exchange Shipping Company (Limited), Samuel Lucas, George Bassett, James Marsden, J. Nicholson, Edward Lucas, W. Mercer, Tobias Smith, M. H. Nicholson, David Ward, I. Howard and Samuel Cocker against the British steamer John Bramall, her engines, boilers, tackle, apparel, furniture and freight, and against all persons intervening for their interest, in a cause of limitation of liability, civil and maritime, setting forth among other things, that by reason of the facts and circumstances stated in said libel and petition, and by the general maritime law, and by the statutes of the United States, they are entitled to and claim the benefit of limitation of liability for the loss, damage or injury arising from the stranding of the said steamer John Bramall, on Little Gull Island, on the 18th day of October, 1878, and sustained by the shippers or owners of the cargo laden on said steamship, or by any one else, and praying this court to cause an appraisement to be had of the amount or value of the interest of the said libellants respectively in said steamship at the time of the said loss and damage referred to in said libel, and in her pending freight; and for the payment of such amount into court, or for the giving of a stipulation with sureties for the payment thereof into court whenever the same be ordered; and to otherwise order and direct what shall be done by the libellants in this suit in order to secure and have the benefit of the law limiting their liability, and upon compliance by the libellants with said order to cause a monition to be issued against all persons claiming any damages or any recovery against the said steamship or her owners, by reason of the stranding of the said steamship as aforesaid, citing them to appear before this honorable court and make due proof of their respective claims and the amount thereof, if any such claims

The Steamship John Bramall.

they have, at or before a certain time by this court to be named in said writ ; and that such further notice be given as this court might direct, and if any liability be found to exist, that the court would apportion the sum for which the libellants may be liable among the parties entitled thereto ; and to make an order restraining the prosecution of all and any suit or suits against the libellants or against the steamship in respect of any such claim, as is provided by the rules and practice in admiralty, and for such other and further relief as to the court shall seem meet, it is now, on motion of Butler, Stillman and Hubbard, proctors for the libellants and petitioners,

“ Ordered, that all persons and parties interested, sustaining damage or injury by reason of the stranding aforesaid, show cause before this court, at the court rooms thereof, in the United States Court House, in the city of Brooklyn and State of New York, on the twelfth day of March, 1879, at eleven o'clock in the morning of that day, or as soon thereafter as counsel can be heard, why an appraisement should not be made of the said steamship, and of the interest of the libellants respectively in said steamship, and in her pending freight for the voyage upon which she was bound, and why the libellants and petitioners should not have such other, further or different relief, or order, in the premises as may be meet and proper, and in the meantime and until otherwise ordered by this court, let the commencement or prosecution of all or any suits against the said libellants and petitioners, as owners of said steamship, for or on account of any of the damages arising from the stranding mentioned and referred to, be hereby enjoined and restrained ; and, on like motion, it is further

“ Ordered, that notice of this order be given to all persons interested, by publishing a notice thereof in the Brook-

The Steamship John Bramall.

lyn *Daily Union-Argus* and in the *New Haven Journal and Courier*, for fourteen days prior to the return-day of this order, and by mailing copies thereof to the Winchester Repeating Arms Company of New Haven, Connecticut, and to the Providence Tool Company of Providence, Rhode Island, and to such other persons as the libellants' proctors may be advised."

Under this order special appearances have been entered by various parties in interest, for the purpose of objecting to the jurisdiction of the court; and on behalf of the Winchester Repeating Arms Company special exceptions to the libel have been filed.

One important question thus raised is, whether, upon the facts stated in the libel, the libellants are entitled to have applied for their benefit that rule of the general maritime law which limits the liability of a ship-owner to the value of his ship and freight?

In regard to this question there seems to be no difficulty. It appears by the libel that the stranding out of which the libellants' liability arose, occurred at a place within the territorial limits of the United States. The libellants having seen fit to navigate their vessel within the territorial limits of the United States, have subjected themselves in the matter of the extent of their liability for acts there done to the laws of the United States there in force; and as the statutes of the United States "are to be given full operation in all cases occurring within the limits of the binding obligation of these statutes" (Story, *Conflict of Laws*, sect. 373-g)—that is to say, in all cases arising within the limits of the United States—the extent of the libellants' liability, caused by the stranding set forth in the libel, is to be determined according to the statute law of the United States upon the subject of the limit of the liability of owners

The Steamship John Bramall.

of ships, now to be found in sections 4283 and 4284 of the Revised Statutes of the United States. And as the libellants are to be judged in respect to the extent of their liability by those statutory provisions, they are entitled to claim any benefit afforded by those same provisions.

In the case of *Thomassen v. Whitwell*, before this court, (9 Ben. 403, 458,) the application of these provisions of the statutes of the United States was denied to certain foreigners, and the rule of the general maritime law was applied in their behalf; but in that case the liability arose out of a collision on the high seas beyond the territorial limits of the United States, where, as this court held, the statutes of the United States had no effect, and where the only law of the place was the general maritime law, which by comity courts of admiralty are permitted in a proper case to administer. That decision is supported by the decisions of the English courts upon a similar question. (*Cope v. Doherty*, 2 De Gex & J. 614; *The Wild Ranger*, 1 Lush. 553; *The General Iron Screw Collier Co. v. Schuman*, 29 L. R. Ch. 877.)

The principle upon which this court proceeded in the case referred to was acted upon by the Supreme Court of the United States in *Smith v. Condry* (1 How. 28), where it said: "The collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes there in force."

The question presented in England by the English Act of 1862, is a different question from that which arose in the cases above referred to, and different also from that which arises under our statute.

For these reasons, I am of the opinion that the present libel, in so far as it seeks at the hands of this court an application of the rule of the general maritime law, is bad.

The Steamship John Bramall.

I next proceed to inquire whether, upon the facts stated in the libel, any benefit is afforded the libellants by the provisions of the statutes of the United States above referred to. Here the contention on the part of the objectors is, that inasmuch as it appears on the face of the libel that no action has been instituted either against the libellants *in personam* or against their ship *in rem* to recover for the losses caused by the stranding in question, this court has no jurisdiction under the statute to entertain an action instituted by these ship-owners for the purpose of effecting a distribution of the value of their ship among those having valid claims for such losses, and of obtaining protection against future proceedings to recover for such losses.

The argument is, that the Supreme Court of the United States, by the language used when deciding the case of *The Norwich Co. v. Wright* (13 Wall. 104), and in framing rules of 1872 (Admiralty Rules 54, 55, 56, 57), for the purpose of regulating the method for obtaining the benefit of the statute, have in effect construed the statute as applicable only in cases where suits have been instituted either against the ship-owner or his ship.

It is evident that the Supreme Court, when deciding the case of *The Norwich Co. v. Wright*, as well as in framing the rules of 1872, had in mind no cases save those where suits have been instituted against the ship-owner or his ship. But it cannot, I think, be supposed that it was intended by the court to declare that the operation of the statute was to be limited to cases of that description. The case then before the court was one where suits had been instituted. No question was made in regard to cases where no suits have been begun, and neither the decision referred to nor the rules can properly be held by implication to furnish authority adverse to such a case.

The Steamship John Bramall.

In the absence of any previous authoritative construction of the statute, the language of the Act, as understood by this court, must, therefore, on this occasion, control the determination. Looking to the statute itself, I am unable to find in it any words of limitation by which to determine that its operation is to be confined to cases where actions have been instituted to recover for losses, and against which relief is sought. No such words of limitation have been pointed out by the advocates of the objectors. The language is as follows: "The liability of the owner of any vessel for any embezzlement, loss, etc., * * * * done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." (R. S. Section 4283.) These words appear to me to be intended to give to the provision effect under all circumstances, and such an intention is in harmony with the object of the statute.

But it is further said there is no provision in section 4283 which authorizes an action on the part of the ship-owner to obtain the benefit of the provision, and the section must therefore necessarily be considered to confer simply a right of defence against actions brought.

I know not on what ground so to hold. Clearly section 4283 confers upon the ship-owner a right to a limitation of his liability in any case where losses such as the statute describes occur. How, then, can he be denied access to a Court of Admiralty,—being a Court of Equity, and, as now settled, having full jurisdiction of the subject-matter,—for the purpose of asserting that right?

The language of the Supreme Court in *The Norwich and New York Transportation Co. v Wright*, where it is said: "Congress might have invested the Circuit Courts of the

The Steamship John Bramall.

United States with the jurisdiction of such cases by bill in equity," indicates an opinion by that court that any right under this statute that could be enforced by a bill in equity before the chancellor, can be enforced by libel in a Court of Admiralty. A proceeding like the present is quite analogous, in respect to the principle which permits the action to be brought, to bills of peace, bills to set aside contracts tainted with fraud or entered into by mistake, which are common in Courts of Chancery.

Here the vessel lies sunk on Little Gull Island, but, as the libel shows, these ship-owners have in their possession wreckage saved from the vessel which they desire to abandon for distribution among those claiming losses. This property they cannot sell without danger of affecting their right to a limitation of their liability. No creditor has pursued them or this property, although they have had the wreckage for some six months. There are parties who claim to hold them responsible for the consequences of the stranding of the vessel, who delay the institution of their actions. Under these circumstances there seems to be a plain equity in the application of these ship-owners to be permitted now to abandon their vessel and have an adjudication as to the extent of their liability arising out of the stranding in question. Nor is it seen how the rights of any one can be prejudiced by such a course.

For these reasons I am of the opinion that the right conferred by section 4283 of the Revised Statutes of the United States affords a legal foundation for the present proceeding.

But if not, then I am of the opinion that this proceeding is an appropriate proceeding within the meaning of section 4284. Here the contention of the objectors is, that the proceeding of the libellants is not such a proceeding as is

The Steamship John Bramall.

authorized by section 4284, because the libellants do not admit any liability at all. It is said the only proceeding authorized by section 4284, is a proceeding for the single purpose of apportioning a sum of money for which a ship-owner is liable, and upon the face of this libel there is no such sum, because the libellants deny all liability.

A similar objection was overruled by Judge Blatchford in the case of *The Oceanus* (6 Ben. p. 124). Since the promulgation by the Supreme Court of the United States of the rules of 1872, wherein is contained an express provision permitting a denial of the ship-owner's liability, it cannot be considered open to the District Courts to reject a proceeding as not authorized by section 4284, because a denial of all liability is one feature of the proceeding.

I have thus reached the conclusion that this proceeding can be maintained as a proceeding duly authorized by law, in which it is competent for a Court of Admiralty to grant to these libellants the relief prayed for, by virtue of the statutory laws of the United States, to which reference has been made.

It is next to be considered whether the proceeding has been instituted in a proper district. It appears from the libel that the stranding in question occurred within the territorial limits of this district; and, also, that the property which the ship-owner seeks to abandon, is within this district, and that no suit has been instituted in any other district. These facts make this a proper district, at least, in which to institute a proceeding looking to the distribution of this property.

There remains to consider several questions of less importance raised by the special exceptions filed to this libel. One objection so raised, is that the libel does not conform to the twenty-third Admiralty rule, which provides, that if

The Steamship John Bramall.

the action be *in personam*, the places of residence of the parties must be stated. This proceeding, it is said, is an action *in personam*, and the libel is defective in omitting to state the residence of the libellants. I have on a former occasion expressed the opinion that a proceeding under these sections of the statutes of the United States, is in its nature an action *in personam*. The opinion that it is a proceeding *in rem* has been expressed by Judge Blatchford, in the case of *The Oceanus*. (6 Ben. 124.) But whether the proceeding be *in personam* or *in rem*, or whether it partakes of the character of a proceeding both *in personam* and *in rem*, is not an important question here, for aside from the twenty-third Admiralty rule, there is a good reason why the residence of the libellant should be stated in all cases where it is sought to invoke the rule of the maritime law in regard to the limitation of a ship-owner's liability. That reason is, that the action of the court may depend upon the residence of the parties making the application. In this case, for instance, the libellants are conceded to be British subjects, residents of Great Britain; and inasmuch as by the present statute law of England, British courts are forbidden to administer the general rule of the maritime law even in cases arising on the high seas, and between foreigners, it may be that American courts will not feel bound to entertain the prayer of British subjects for the benefit of the rule of the maritime law to the detriment of citizens of the United States. The libel should therefore state the nationality and residence of the libellants, in order to enable that question to be presented to the court at the commencement of proceedings, and by exception to the libel.

The next objection to the libel is, that it mingles together two distinct rights having different sources, viz., a right arising under the general maritime law, and a right

The Steamship John Bramall.

arising under the statute of the United States. The libel describes a certain state of facts, and upon those facts claims alternative relief. The principle upon which the practice of the Admiralty Court rests, namely, to give despatch, avoid circuitry or multiplication of actions, and to afford any relief that the facts may justify, and that is in accordance with equity, will surely permit the demanding alternative relief in a case like this. The libel is not therefore defective, because it is a libel with a double aspect.

Lastly, it has been said that the libel does not make an absolute tender of the vessel and wreckage, to be distributed by this court; but while it tenders with one hand, withdraws the tender with the other. I do not so read the libel. As understood by me, and also as understood by the libellants, according to their contention here, the libel tenders an absolute surrender of the vessel and the wreckage in the hands of the libellants, to the custody of this court, to be disposed of according to the order of this court, and in case the proceedings be entertained, it will be impossible afterwards to withdraw the fund from the control of the court. Of course, if upon the final determination of the cause, it be held that there is no valid claim upon this property for losses occasioned by the stranding in question, it will then be open to the libellants to ask at the hands of the court a re-payment of the fund to them—but none the less is there the absolute abandonment which the law requires.

I have now considered all the questions upon which my opinion has been sought, and the result is, that with an amendment showing the residence of the libellants, as to which there is no dispute, the libel will be entertained and an order made for the ascertainment of the interest of the libellants in the said vessel at the time of the loss and damage mentioned, and for the payment of such sum into the

The Steamship John Bramall.

registry of the court, and that a monition thereupon issue according to the prayer of the libel.

Subsequently, on the 16th of July, the following decision was made :

BENEDICT, J. Upon settlement of the order to be made in pursuance of the decision of this court in this cause upon the exceptions, rendered June 21st, 1879, the point has been made, that no authority in law exists by which the court can direct the marshal to take into his custody the property which the libellants desire to surrender to the court for distribution among those who may be found entitled to share therein.

The statute, it is said, confers no authority save only to apportion a sum of money or to appoint a trustee, to whom the ship-owner may transfer his interest in the vessel, and the only authority conferred by the Admiralty rules is to authorize payment into court of the value of the ship-owner's interest in the ship and freight, or to accept a stipulation for the payment of such value, or for the transfer of the interest to a trustee to be appointed by the court.

Upon examining the libel it will be noticed that it contains no prayer to be allowed to make a transfer to a trustee, nor for the appointment of a trustee to accept such a transfer. The only prayer is that the court would order the sale of the vessel, or for the appraisement of the value of the vessel and her pending freight, and for the payment thereof into court, or for the giving a stipulation for the payment thereof into court.

While the libel thus appears to ask this court to sell the vessel, and may be considered as asking that all things be done necessary to accomplish such a sale and realize the

The Steamship John Bramall.

proceeds which would involve taking the vessel into custody, there are no facts averred in the libel or presented by affidavit showing any necessity for a sale by the court. Therefore, while not intending to decide for or against the existence of the power to sell in a proper case, I have no hesitation in saying that circumstances will be required to warrant the adoption of any methods of procedure other than those which have been formally approved by the Supreme Court in the Admiralty Rules. No such circumstances are here shown and the order must therefore be for the appointment of appraisers and a payment into court of the appraised value.

Proctors for libellants, *Butler, Stillman & Hubbard*.

Proctors for Winchester Arms Co. *et al.*, *Robinson & Scribner*, and *R. D. Benedict*.

Proctors for Atlantic Mutual Ins. Co. *et al.*, *Scudder & Carter*.

NOTE.—A statement of the practice followed in this case may be of value to those investigating the subject.

Upon the rendition of the above opinion as to the appraisal of the property, the libel was amended by leave of court on notice, so as to pray for the appointment of a trustee by the court to whom the petitioners might transfer their interest in the vessel and freight pending, for the benefit of those persons sustaining loss or damage by reason of the stranding of the steamer who should thereafter prove any claim. A trustee was thereupon appointed, to whom the libellants transferred and assigned in due form all of their several and joint interests in the stranded steamer and her freight pending. A monition was issued to the marshal of the district to summon all persons claiming to have sustained damage or loss by reason of the stranding of the steamer, to appear before a commissioner appointed for the purpose, to prove their claims within three months. Meantime the trustee obtained leave of court, on notice to all parties who had appeared in the matter, to sell the wreck of the steamer as perishable; the sale realized \$2,100. Upon the return-day of the monition, no claimants having appeared before the commissioner, default was noted,

The Steamship Hammonia.

and thereafter a final decree was entered, granting the prayer of the petition for limitation of liability. The trustee sold the wreckage, consisting of chains, hawsers, rigging, sails, etc., and also the interest of the libellants in the freight pending, at public auction, realizing \$308.90; and thereafter petitioned the court for leave to pay the whole amount received by him into court, and to be allowed his reasonable compensation for services. A reference was ordered to determine the amount of services and the proper compensation therefor, the report of the referee was confirmed on notice to proctors of all parties who had appeared in the matter: and the balance found to be in the trustee's hands, being by him paid into the registry of the court to await the claims of any persons who might have suffered damage as aforesaid, the trustee was discharged, and proceedings under this petition ended.

Southern District of New York.

JULY, 1879.

THE STEAMSHIP HAMMONIA.

**PASSENGER'S CONTRACT.—CONTAGIOUS DISEASE.—DUTY OF MASTER.—
JURISDICTION.**

F. filed a libel against a steamship, alleging that he took passage on her for Hamburg, with his wife and son, and that when two days out from New York, the master compelled them to leave the stateroom in the first cabin and confined them during the voyage, in another room which was unfit for them. It appeared that the child was taken with an attack of small-pox or varioloid, and that the master of the ship directed the child to be removed to the steward's room, telling the father and mother that, if they went with it they must stay and would not be allowed to come into the first cabin again, and accordingly they were all removed and were not allowed thereafter to come to the first cabin:

The Steamship Hammonia.

Held, That the court had jurisdiction of the cause of action ;
That the act of the master was but the performance of his duty towards the other passengers ;
That the accommodations provided were reasonable, and that there was no unreasonable confinement, and that the libellant had no cause of action.

CHOATE, J. The libellant in this suit, Henry A. Fleischmann, took a first-class passage for himself, his wife and son, a boy of three and a half years old, on board the steamship Hammonia, in April, 1873, for Hamburg. He complains in his libel that, when two days out from New York, the master compelled them to leave the state-room in the first cabin upper saloon, and confined them without cause in another room opposite the kitchen and known as the steward's room ; that from the 5th to the 14th of April they were all confined in this room and not allowed to leave it "for air, or exercise, or to fulfil the calls of nature ;" that this room "was filled with bad odor, was filthy, overrun with rats, cockroaches and other vermin, and was not suitable for nor fitted or intended for the accommodation of three persons ;" that the libellant and his son were obliged to "sleep in and occupy the same berth," and that he was often "bitten by rats which infested said room," and that "when he expostulated and demanded that he should have the stateroom which he had engaged," the master "insolently refused." And he claims damages in the sum of \$10,000, alleging not only the loss and deprivation of the comforts and accommodations engaged and agreed to be furnished to him and his family, but great bodily and mental "distress and agony," and injury to health during the voyage and for a long time afterwards, resulting from the confinement in said room. Upon the trial the libellant was allowed to amend his libel, alleging injuries to his baggage from the gnawing of his trunks by rats. The defence is that the child had the small-pox, and that it be-

The Steaming Hammon.

that the libellant was kept apart from the other passengers, and that the libellant and his wife voluntarily accompanied him when the master caused him to be removed to the chief steward's room. That they were informed that if they remained with the child they would not be allowed to go into the first cabin or mingle with the other passengers: that these provisions were necessary to prevent the disease from spreading among the passengers and crew. And the claimants deny in all other respects the averments of the libel as to the libelant's discomforts and injuries suffered by the libellant and his wife and son, and also all the averments as to the injury and improper restriction of the room to which they were removed.

There is no doubt that this court has jurisdiction of the case. *The Maud Tipton*, 4 Wall. 411; *The New World*, 15 How. 470.

There can be no doubt also, that the master of a ship has authority, and that it is his duty, in case of the appearance of a dangerous and infectious disease, to isolate the sick person from all others on board so far as it can be done with a reasonable regard to his comfort and welfare, so as to protect from infection as far as possible the other passengers and the crew. And in this case, upon the master's receiving information from the physician that the disease was small-pox, he did no more than his duty in removing the child from the first cabin: and the restraint put upon the parents who went with him to another part of the ship, in preventing them, while living in the room with the child, from going into the first cabin again, was reasonable and proper. The fact that the claimants had sold the libellant first-class tickets and assigned to him a room in the first cabin, with the comforts and accommodations appertaining thereto, did not and could not abridge the master's author-

The Steamship Hammonia.

ity in this respect. The safety of the ship and the passengers and the ship's company is the first consideration with the master, and overrides any special assignment to a passenger of particular accommodations, where the continuance of the enjoyment by him of such special accommodations will during the voyage seriously endanger the lives or the health of all on board. I think the testimony shows that in this case the child had a very light case of small-pox or varioloid, and that his removal from the state-room in the first cabin was necessary and proper.

The libellant has testified to nearly all the discomforts, inconveniencies and injuries set forth in the libel and some others as serious, except that there is no evidence offered of any ill health resulting from the alleged confinement; but on all the material points in respect to the manner in which the change of rooms was effected and the hardships and discomforts attending and following it, the libellant is contradicted and his statements shown not to be founded in fact. The proof is that the chief steward's room was fitted with two berths and a sofa; that it was a suitable room for three persons; that the libellant was not obliged to sleep in the same berth with his son; that the room was well ventilated and comfortable; that it was not filled with bad odors from the kitchen; that the libellant and his wife were not confined in the room; that he was not restrained in any way from going to other parts of the ship except the first cabin; that he went when he pleased on deck; that he went into the smoking room and elsewhere; that his wife was not prevented from leaving the room; that she occasionally went on deck; that one servant was specially detailed to wait on them and that they had as much comfort and as good accommodations as their exclusion from the first cabin rendered possible; that the steward's room itself was substantially fitted up as

The Steamship Hammonia.

well as the staterooms, and when the ship was full it was occupied by first cabin passengers. The libellant testifies that it was infested by rats and cockroaches, and that he complained of the rats to the captain and that the captain passed the matter off as a joke. I am satisfied from the testimony of the captain, and the seaman who served the libellant's family, and the doctor, that this story about the rats and cockroaches is greatly exaggerated or wholly unfounded. It is certainly proved that he made no complaints of the room; on the contrary, that he expressed himself much pleased with it, and with the manner in which he was treated. That the libellant and his wife suffered some inconveniences from their necessary isolation from the rest of the passengers, is undoubtedly true; but these were as slight as could be expected, under the circumstances, and were not aggravated by any neglect or ill-treatment on the part of the master or officers of the ship. They left the ship voluntarily at Cherbourg. At that time they made no complaint of ill-treatment. The libellant has failed to make out any cause of action.

Libel dismissed, with costs.

For libellant, *Chas. E. Soule* and *Geo. F. Betts*.

For claimants, *Redfield & Hill*.

Jaycox v. Alonzo R. and Sarah E. Chapman.

JULY, 1879.

WILLIAM E. JAYCOX vs. ALONZO R. CHAPMAN
AND SARAH E. CHAPMAN.

FOREIGN ATTACHMENT.—BOND.—SURETY.—PRACTICE.

A libel being filed against a man and his wife, and process with a clause of foreign attachment having issued, the marshal attached property. The wife filed a claim to the property and gave a bond under the Act of 1847. The libellant examined the sureties as to their sufficiency and they, having justified, the property was discharged. The cause was thereafter tried and resulted in a decree in favor of the libellant against the husband, and a dismissal of the libel against the wife. The libellant moved for a decree that the sureties on the bond pay the decree against the husband, on the ground that it had appeared on the trial that the property attached and delivered up on the giving of the bond, was really the property of the husband:

Held, That, whether it was irregular practice or not, to file a claim in an action *in personam*, nevertheless the sureties could not be held beyond the terms of the bond which they had signed; and that by that bond they had only become sureties for the performance by the wife of any decree against her and could not be called on to pay the decree against the husband.

CHOATE, J. In this case a decree having been rendered against the defendant Alonzo R. Chapman and in favor of Sarah E. Chapman, dismissing the libel as against her, it is now insisted that the stipulators upon a bond given by her upon the release of certain vessels attached under the process of foreign attachment, are bound by the terms of their bond to pay the decree against Alonzo R. Chapman. May 28th, 1877, the marshal attached the vessels. May 29th, the defendant, Sarah E. Chapman, filed a claim for the said vessels in the form usual in case of the attachment of vessels by process *in rem*. She filed, also, a stipulation for costs

Jaycox v. Alonzo R. and Sarah E. Chapman.

and a bond, conformably to the requirements of the Act of March 3rd, 1847, the condition of the bond being: "That if the above bounden Sarah E. Chapman, claimant, and Francis F. Budd and William E. Chapman sureties, shall abide by and perform the decree of this court, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue." The libellant had notice of the claim and the bond offered, and the sureties were examined as to their sufficiency, and, they having justified, the property was delivered to the claimant.

It is now insisted that the practice of filing a *claim* in a suit *in personam* is irregular and without warrant of any statute or rule of court; that the bond takes the place of the property discharged, and if that was the property, not of Sarah E. Chapman, but of Alonzo R. Chapman, as is now contended by the libellant, the sureties are bound by the bond to pay the decree against him.

It is unnecessary to determine whether the practice which has grown up in such cases is regular or not, because it is very plain that the stipulators cannot be bound on their bond beyond its terms fairly understood. The libellant had notice of the application to bond the property, and made no objection to the method adopted nor challenged the right of Sarah E. Chapman as its owner to bond it. It was understood as well by him as by the sureties who went on the bond that they were becoming bound for Sarah E. Chapman, and not for Alonzo R. Chapman, and upon the release to her of property against which, as all the parties assumed, there was no claim on the part of the libellant, unless he recovered judgment against her. However irregular the form may have been, the position and obligation of the parties are just the same as if she had presented a petition to the court, setting forth that she was the owner of the property

Jaycox v. Alonzo R. and Sarah E. Chapman.

and praying leave to substitute a bond in place of it, and upon notice thereof to the libellant and without objection on his part this bond had been given and the property delivered to her. What, then, as applied to this case, did the stipulators agree to? Clearly, they understood that they became bound only for Sarah E. Chapman, and not for Alonzo R. Chapman. Their bond was a substitute for and put in place of her property. All parties must have so understood. Such is the reading of the condition: "If the said Sarah E. Chapman, claimant, and Budd and Chapman, sureties, shall abide by and perform the decree of the court," that is, she, as the principal party who is to have or may have something decreed to be done or performed by her, and they as her sureties for the doing of it. There is no reference here to abiding by and performing anything to be done and performed by Alonzo R. Chapman. There is nothing decreed to be done and performed by Sarah E. Chapman. Therefore, there has been no breach of the bond and can be no liability of the sureties thereunder. To give it any other construction would do violence to its language and be inconsistent with what all the parties, including the libellant, must have understood to be the purpose of the bond, namely, the substituting of something in place of her property which was under attachment.

It is insisted that, by the evidence taken in the case, it appeared that the vessels thus released were really the property of Alonzo R. Chapman, and not of his wife. If this were so, or libellant had a doubt that it might be so, he should have applied to the court to have this question settled before they were delivered up to Sarah E. Chapman, or for such security as the peculiar facts of the case called for. Not having done so, he must be deemed to have acquiesced, as against these sureties, in her claim, that they belonged to

'The Steam-tug E. A. Packer and the Barge John Neilson.

her. The sureties had no interest in that question, and were only called on to become bound for her. The libellant had the opportunity to raise the question when it was proposed to bond the property; but to permit him to raise it now as against the sureties would do gross injustice.

No decree can be entered against Sarah E. Chapman or her sureties.

For libellant, *E. D. McCarthy.*

For respondents, *W. R. Beebe.*

JULY, 1879.

THE STEAM-TUG E. A. PACKER AND THE BARGE JOHN NEILSON.

COLLISION IN NORTH RIVER.—VESSEL AT ANCHOR.—TUG AND TOW.—
LOOKOUT.—HARBOR REGULATIONS.—FOREIGN VESSEL.

A schooner was lying at anchor in the North River, near the foot of 30th street, and within 300 feet of the end of the pier. A regulation of the port prohibited the anchoring of vessels within 300 feet of the line of the docks. The vessel was from Maine, and her master was not aware of the regulation. The schooner had a proper anchor light set and a proper anchor watch on deck. The tide was flood. A tug, with a barge in tow on a hawser astern, came up the river, and the master of the tug, thinking he could land the barge at a pier at 32d street better by having the barge alongside, slowed the tug when about off 23d street, and signalled the barge to cast off the hawser, which was done and those on the tug began to haul it in. As the barge came up by the tug, the captain of the tug hailed the captain of

The Steam-tug E. A. Packard and the Barge John Neilson.

the barge to look out for the barge till he got round on the starboard side of her, and the captain of the barge answered in substance that he would. The barge went ahead with her own momentum and the tide, and, while the tug was in the act of making fast, struck the schooner and sunk her. Shortly before she struck, the captain of the tug called to the captain of the barge to starboard his wheel. The wheel of the barge was starboarded before the collision. The owners of the schooner filed a libel against both tug and barge to recover their damages:

Held, That, on the evidence, the light of the schooner was not seen by those on the barge as soon as it should have been, by reason of a negligence in looking out, her captain being at the wheel and no one else on the lookout; and that the helm of the barge was not starboarded as soon as it should have been;

That the barge did show that, if she had kept a better lookout, the collision would still have happened:

That, even if the barge was cast loose by the act of the tug, that would not excuse her from the prompt and vigilant use of such means of avoiding danger as she had; and that the barge was in fault, therefore, and that such fault contributed to the collision;

That the master of the tug, knowing the speed of the barge and the strength of the tide and knowing that the barge had but two men on board, one of whom must be engaged with the lines and the other at the wheel, ought to have let go of the barge at a sufficient distance from the schooner to enable the tug to make fast to the barge again before she reached the schooner;

That the tug, also, after casting off the barge, failed to keep a good lookout, and failed to warn the barge to starboard her wheel as soon as it should have been done;

That the tug was therefore also in fault, and that such fault contributed to the collision;

That the schooner was not chargeable with a fault contributing to the collision in anchoring where she did, notwithstanding the regulation of the port, especially as it appeared that vessels were in the habit of anchoring where she did.

CHOATE, J. This is a suit to recover damages caused by a collision between the schooner N. H. Hall and the barge John Neilson, on the evening of the 24th of September, 1878. The schooner had arrived in the North River, off 30th street, in the afternoon of the 23d of September, with a cargo of

SOUTHERN DISTRICT OF NEW YORK,

The Steam-tug E. A. Packer and the Barge John Neilson.

... stones from St. George, in the State of Maine, and at ... o'clock on that day she came to anchor, to await ... to discharge at the pier at the foot of 30th street. ... anchored about 180 feet out into the river from the ... of that pier and about the same distance down the ... from the pier. The collision took place between ... and eight o'clock in the evening of the next day after ... came to anchor. The tide was flood, and she was head- ... down the river. It was after dark, and she had a proper ... light set in her fore-rigging. She was laden with ... four hundred tons of stone. The evening had been ... , but it was clearing away, and some stars were visible, ... lights of vessels could be seen without difficulty. The ... steam-tug E. A. Packer took in tow the barge John Neilson at ... pier 4, East River, at about six o'clock, to be towed round to a ... pier just below 33d street, North River. This pier was a ... short pier between the two long piers at 30th and 33d streets. The barge had been a side-wheel steamer. She was 175 feet long and 28 feet wide, sharp forward under water, having a main deck, and over that a roof or upper-deck some twelve feet above the main deck, and on top of that forward a pilot-house or wheel-house in which was the wheel by which she was steered. From the rail to the roof or upper-deck were curtains on both sides, so that she offered a large surface to the wind. Her crew on this occasion consisted of two men, one her captain, who was not a licensed pilot, and was stationed in the wheel-house, and the other a deck hand. She was towed by a hawser forty or fifty fathoms in length. As the tug with the barge in tow came up the North River she ran along on the New York side, and when she reached the vicinity of 23d street ferry slip, they were about three hundred feet out from that ferry slip and heading directly up the river. In order to put the barge into her berth, the

The Steam-tug E. A. Packer and the Barge John Neilson.

captain of the tug concluded to take her alongside instead of keeping her on the hawser, not feeling sure that those in charge of her could bring her safely and properly up to her berth, if brought up by the hawser. He desired to take the barge on his port side as the tide then was, in order to put her at the dock. For the purpose of making this change, when the tug was opposite 23d street ferry slip, and then heading with her tow directly up the river, and a little to the westward of the schooner, the tug slowed, sheered off a little to port, and gave a signal to the barge to throw off the hawser, and those on the tug immediately commenced hauling in on the hawser. The barge with the momentum which she had, prior to the slowing of the tug, kept on up the river, passing the tug on the tug's starboard side and very close to her, the tug meanwhile reversing her engine, intending to go under the stern of the barge and come up on her starboard side when the barge had got by, and there make fast to her starboard quarter. The captain of the barge testifies that the hawser was thrown off only a short distance below 30th street; but he is evidently mistaken, and the overwhelming weight of the testimony from both vessels is that this manoeuvre was commenced as low down as 23d street, and that the barge came up to and passed the tug about off 25th street. As the barge passed the tug the captain of the tug called out to the captain of the barge to look out for the barge till he got round on the other side, and the captain of the barge replied, saying in substance that he would look out for the barge. The tug then came up on the starboard quarter of the barge and they were in the act of making the lines fast between the barge and the tug when the barge came into collision with the schooner. The starboard bow of the barge struck the starboard bow of the schooner, knocking a hole in her so that she sank in

The Steam-tug E. A. Packer and the Barge John Neilson.

about five minutes, and her crew took to their boat, losing all their effects. Shortly before the barge struck the schooner, the captain of the tug, which was then lapping the starboard quarter of the barge, and just passing her lines to the barge, saw the danger and called to the captain of the barge to starboard his wheel. The testimony tends to show that he called to him twice to this effect. The captain of the barge testifies that he did starboard his wheel, as soon as he saw the schooner, and had it hard a-starboard at the time of the collision. Although this witness is very seriously contradicted on other points, I think there is not sufficient ground to reject his testimony on this point ; but it is obvious enough that if his statement is true, he did not starboard soon enough to steer clear of the schooner, with such steerage way as the barge then had.

The light of the schooner had been seen on the tug before she signalled to the barge to throw off the hawser, as well as the lights of quite a number of other vessels at anchor, lying to the westward and northward of the schooner. The space between the schooner's light and the next westerly light observed by those on the tug, seemed to them to be about a hundred yards, and the testimony shows that this judgment was about right. The captain of the tug judged that the space between these two lights was sufficient for him to go through in safety, though he was not certain whether the light on the schooner was a vessel's light or a light on the end of the pier at the foot of 30th street. The distance from him of the schooner, and the nearest of these other lights, when he slowed and gave the signal, was about a third of a mile. These lights, including the schooner's light, were also seen by the deck-hand on the barge, when she was about off 24th street, before she passed the tug, and he observed that the barge then headed a little to the west-

The Steam-tug E. A. Packer and the Barge John Neilson.

ward of the schooner's light. But so far as appears, he did not report the light to the captain, who acted as wheelsman, and also as lookout, so far as there was a lookout on the barge. The captain of the barge says that the tug obstructed his view of the light till he got within about a barge and a half's length from the schooner, and that then, the tug getting out of his way, he saw the light, and immediately starboarded to clear it. But as, on the other point above referred to, his testimony as to the time and place when and where the tug got out of the way of the barge, is clearly overborne by all the other evidence, and he is on this point also evidently mistaken, and if he did not see the schooner's light from a point off 24th street, or thereabouts, it was because he was negligent in his observation and kept no good lookout. It may well be that he did starboard when he saw that he was running into her.

It is evident enough that the collision was caused by the negligence of the tug, or of the barge, or of both of them. The libel charges that it was caused by the "negligence and unskilfulness of those in charge of said tug and barge, in that said barge was brought by said tug into such close proximity to said schooner, and said barge was improperly navigated by those in command of her, and was without any lookout or light, and that no sufficient lookout was kept upon said tug-boat, nor was the speed of said barge and tug slackened in due time, and in allowing said barge to collide with a vessel at anchor." No point is now made that the barge had not proper lights. 'The tug and the barge, while both insisting that the schooner was anchored in an improper place, a point hereafter to be considered, attempt to throw on each other the fault of the collision. The barge insists that so far as she was concerned, the collision was inevitable; that she was cast off by the tug at such a rate of

The Steam-tug E. A. Packer and the Barge John Neilson.

speed, and so headed towards the schooner, and at such a short distance from her, that when the tug, by sheering to port, first uncovered to her the schooner's light, it was impossible, by the utmost exertions of her wheelsman, to clear the schooner; that she did all she could, but the distance was too short to sheer the barge sufficiently. The tug, on the other hand, insists that the barge, from the time she was cast off, had entire control of herself, so far as the avoidance of the schooner was concerned; that she had steerage way and could, by starboarding in time, have avoided the collision; that it was not negligent to cast her off at the time when and under the circumstance under which it was done, and that the collision was, aside from the improper anchorage of the schooner, caused solely by the gross negligence of the wheelsman of the barge, in not steering her properly, and by the obstruction of the cleets and chocks on the barge, which, it is claimed, delayed the efforts of those on the tug, in making fast to her, when the danger was discovered, and when, if the tug could have been immediately made fast, she might, by backing, have saved the barge from striking the schooner.

As regards the plea of the barge, it is enough to say that the alleged facts, on which it is based, have no support in the evidence. There is, indeed, great conflict of evidence, or rather of opinion, whether the barge continued to have steerage way up to the time she reached the schooner, and also as to her speed through the water at the time she was cast loose, and how much it was diminished before the collision; but there is little or no doubt upon the evidence that for a considerable part of the distance between these two points, she had steerage way, and that if her captain had, at an earlier point of time, observed the schooner's light, and starboarded, he could have avoided her. It is quite clear

The Steam-tug E. A. Packer and the Barge John Neilson.

that he did not keep a good lookout, and there was nobody else on the barge acting as lookout. This throws on the barge the presumption that the want of this lookout was the cause, or one of the causes, of the disaster. And she has not shown, and cannot show, that if she had kept a better lookout, the disaster would still have happened. It is urged, on behalf of the barge, that her being thus cast loose was wholly the act of the tug, that she was not informed, at the time she was taken in tow, of the intention of the tug to take her alongside. This may be, but it certainly does not excuse the barge from the prompt and vigilant use of such means of avoiding danger as were within her control, when she thus found herself cast loose from the tug. It might excuse her for not having a full and proper complement of men for her navigation in such unlooked-for circumstances, provided her crew were full and sufficient for the mode of navigation she had a right to expect; but clearly it does not excuse the failure of the men she did have to use proper skill and vigilance. The charges of the libel are therefore made out.

As to the plea of the tug, the real questions are, *first*, whether it was a safe and prudent thing to do to cast off the barge under all the circumstances existing; and, *secondly*, whether, if it might have been in itself safe and prudent so to do, the tug was chargeable with negligence in the lookout she kept, and the mode of her navigation after casting off the barge, and whether this want of care in either respect caused or contributed to the disaster. The argument on the part of the tug is, that the barge having good steerage, there was no fault in casting her loose; that from that time the tug ceased to control or be responsible for her movements; that she had plenty of room to pass on the schooner's star-board hand, and that therefore there was no negligence in

The Steam-tug E. A. Packer and the Barge John Neilson.

casting her off. It is true, that when she was cast off, new duties as to keeping a lookout and as to steering devolved on the barge; but while the actual connection between the tug and the barge was for the moment dissolved, the barge was still under the general care and charge of the tug, and the tug was surely bound to common vigilance and skill in guarding against and avoiding any dangers to which, while thus separated, the barge should be exposed, or to which she might expose any other vessel. While it is true that the barge had some power over her movements by her wheel so that she could sheer one way or the other, she was in all other respects helpless. She had no means of accelerating or retarding her forward movement. She must go forward just as she was acted upon by the tide and wind, and by the momentum she had received till that was spent. The evidence is very conflicting as to the speed she had. The weight of the evidence is, that, when she was cast loose, she was going at least five or six miles an hour through the water, and with the tide in her favor a mile and a half to two miles faster. The evidence, also, is that when she struck the schooner she had still some headway through the water. At any rate, it is certain that she was shot out up the river with sufficient momentum to carry her in a very short time by her momentum alone, together with the effect of the tide and wind, over the intervening space between her and the schooner, and some distance beyond. It is in proof that as the speed of such a barge diminishes, she loses very rapidly her steerage way, and is easily diverted from a straight line, and not easily controlled by her rudder; that the wind, unless it is very nearly with her, or against her, has a very considerable effect in throwing her stern off, and thus in altering her heading. The wind, at this time, was not strong, and was southeasterly, striking somewhat on her

The Steam-tug E. A. Packer and the Barge John Neilson.

starboard quarter, and may have been sufficient to affect somewhat her course, changing her heading to the eastward. The captain of the tug had full notice of all these peculiarities of the barge, and of all these other matters. He also knew that the barge had but two men on board, and that one of these would necessarily be occupied with attending to the lines, till the vessels were again made fast to one another, thus leaving the wheelsman alone to act as lookout on the barge. It has been so often held improper for the same person to act as wheelsman and lookout, that it is unnecessary to cite any authority to show that the tug thus had notice that in executing this manœuvre the barge would be left with a defective lookout, which is itself negligence, and held to be presumptively the cause of a collision that may be attributable to the want of a proper lookout. I think, therefore, that it was in itself negligent and improper, and showed a want of due care for the tug, to launch this barge out in the direction of this schooner and these other vessels, at a distance which was not clearly sufficient to enable her to overtake and make fast to the barge before reaching them. It involved too much risk of collision through a necessarily defective and insufficient lookout on the barge and through possibilities not easily calculated of her becoming unmanageable before she was again secured. I think it was not shown that there was any appreciable delay in the tug's making fast to the barge by reason of the cleats and chocks on the barge being blocked by freight. Nor have I given any consideration as against the tug to the suggestion, which has some support in the testimony, that the usual and more skilful mode of putting this barge in her desired berth, would be to have kept her on a hawser, gone up the river and rounded to and brought her down head to the tide, in which case she would have gone outside this fleet of ves-

The schooner "Janet" and the tug "Janet" on Nelson.

was I to say that the tug was chargeable with negligence in not taking the schooner in execution of the duty of the tug? I think not if it were as the tug was at the time the schooner was had in tow. The tug was in a safe and proper way, and had no fault to find with the schooner of collision with the schooner. The tug was not in her executing an order of the schooner so far as berthing the barge was concerned. But she was in a way and under circumstances that were liable to this schooner. It is also clear that the tug did not, after casting off the barge, keep a good lookout. In fact, she did not pretend to keep any lookout at all. As above suggested, her duty of vigilance was not discharged by her casting off the barge. In fact, the captain and all hands went aft to attend to getting the hawser in and to making the change to the other side. If he had kept a lookout on the tug, or put a lookout on the barge, he might at least have discovered the danger sooner. He thought it his duty to warn the captain of the barge to starboard his wheel when he did discover the danger, and no doubt it was; but if he had warned him sooner, the collision might have been averted altogether. The charges of the libel against the tug are therefore also made out.

It is, however, claimed by both the tug and the barge, that the schooner was guilty of negligence which caused or contributed to the disaster, by anchoring in an unsafe place, much frequented by vessels going into and coming out from the pier in that vicinity. I think this is no answer for those vessels, which had her in plain sight all the time. Apart from the question raised as to the rules of the harbor-master, who was lawfully there, and they knew she was there, and there is no fault on her part which contributed to the injury.

The Steam-tug E. A. Packer and the Barge John Neilson.

It was proved that by regulations then in force, adopted under the provisions of the New York statute of 1862, ch. 487, all vessels are prohibited under a penalty from lying at anchor within three hundred yards of the line of the docks at this place. She was violating this regulation, but it was proved that her master had no knowledge of the regulation ; that the vessel belonged in the State of Maine and was a stranger here. It also appeared that, notwithstanding the regulations, vessels do constantly lie at anchor in that vicinity inside the line, and while she was lying there, quite a fleet of vessels was anchored there within the line. And it also appeared that the captain of the tug was in the habit of going up and down the river, and was therefore aware of the practice. Under these circumstances, it would be manifestly unjust to hold this schooner to have forfeited her right to compensation by her violation of the regulation, nor do the authorities so hold. No case is cited where a vessel has been held to the rule of contributory negligence in such a case, unless notified of the rule. All persons may be held to take notice of *laws*, but such regulations, though made in pursuance of lawful authority, are not *laws*. In the case of *The McDonald*, decided by Judge Betts (unreported), there was express notice of the regulation. It seems, also, that such municipal regulations may be shown to have been waived by the acquiescence in their non-observance by the local authorities charged with making, altering and enforcing them. (*The John Frazer*, 21 How. 188.) Such a waiver was proved in this case.

It is also claimed, on the part of the claimants, that the schooner was in fault in not having a proper anchor-watch, and in not slacking her chain at the instant of collision so as to fall back. This defence is not fairly raised by the pleadings, but it has no support in the evidence. The lookout on

In the case of D. R. Martin vs. The Ferry-Boat Moonachie.

The court held that the plaintiff's recovery for the loss of his property was not barred by the statute of limitations, as the loss was caused by the negligence of the defendant, and the plaintiff was entitled to recover the full value of the property lost.

The court further held that the plaintiff was entitled to recover interest on the amount of the loss, as the defendant's negligence was the proximate cause of the loss.

The court also held that the plaintiff was entitled to recover costs and fees.

The court also held that the plaintiff was entitled to recover damages for the loss of his property.

The court also held that the plaintiff was entitled to recover interest on the amount of the loss.

Eastern District of New York

JULY 1874

THE STEAMBOAT D. R. MARTIN.—THE FERRY-BOAT MOONACHIE.

CASES AT FERRY-SHIP.—STEAMBOAT AND FERRY-BOAT.—SPEED.—NEGLIGENCE.

Where a fast steamboat on her regular run down the North River to Coney Island was making for a landing near the Hoboken ferry, and came at full speed close in to the pier, and struck a ferry-boat just coming out of her slip:

The Steamboat D. R. Martin.The Ferry-boat Moonachie.

Held, That the steamboat was in fault for running at such high speed in that locality, with knowledge of the position of the ferry-slip and the presence there of the ferry-boat;

That the ferry-boat was not in fault for attempting to back, to avoid the collision, instead of going ahead.

To attempt to pass a ferry-slip at such a rate of speed as renders it impossible to stop in time to avoid hitting a ferry-boat, in case one should come out, is negligence.

A ferry-boat of the Hoboken Ferry Co., running between New York and Hoboken, N. J., was coming out of her slip on the New York side, a little behind time, but very slowly, and her sister-boat was lying in the stream waiting to go in. The D. R. Martin, a steamboat able to run 15 to 18 miles an hour, and then plying between various points in New York and Coney Island, was making for her landing, a short distance below the ferry-slip; and being pressed by another vessel, came in very close to the piers and without slackening speed. Neither vessel could see the other, till the Moonachie began to show outside the long slip. She came out at the slowest speed, immediately saw the D. R. Martin, and backed into the slip again, but not in time to escape collision. Immediately on seeing the ferry-boat, the pilot of the D. R. Martin rang to stop and reverse, adding the danger-signal; but the headway of the steamboat could not be checked, and she struck the ferry-boat on the forward quarter. Each vessel libelled the other for the damage done.

BENEDICT, J. The evidence given by the wheelsman who was at the wheel of the D. R. Martin with the pilot, and who is called as a witness by the owners of the D. R. Martin in respect to the collision which forms the subject of these two actions, is decisive of the controversy. It appears from the testimony of this witness, that the D. R. Martin on her

The Steamboat D. R. Martin.The Ferry-boat Moonachie.

down trip and when bound for her landing, at the end of the pier at the foot of Le Roy street, in the North River, felt obliged, by reason of a vessel approaching from below, to sheer in close to the piers. While the D. R. Martin was proceeding at her usual full speed, and approaching the Hoboken ferry, which is just above Le Roy street, the Hoboken ferry-boat Moonachie was observed by the pilot to be moving out of her slip on her regular trip from her ferry-slip in New York, to her slip in Hoboken. Immediately on seeing the ferry-boat at the mouth of the slip, the engine of the D. R. Martin was reversed with all possible speed, the danger-bell being given to the engineer to ensure the greatest activity on his part, notwithstanding which the D. R. Martin struck the ferry-boat just off the mouth of the slip, doing damage.

It thus appears that the Martin was proceeding close along the piers towards the Hoboken ferry-slip, at such a rate of speed that it was impossible for her, after the ferry-boat came in sight moving out of the ferry-slip, to stop her headway before reaching the ferry-slip. That slip is so situated that by reason of sheds constructed upon the piers on each side, it is impossible for any one on board the ferry-boat to see a vessel coming down the river, until she is close at the mouth of the slip, and equally impossible for a boat approaching from above to see a ferry-boat moving out, until she appears at the mouth of the slip. This condition of the slip was known to those on board the D. R. Martin, who also knew that there was a ferry-boat in the slip about to come out, the latter fact being indicated by the presence of the inbound ferry-boat in full view waiting for the Moonachie to come out.

Under circumstances such as these, it was negligence on the part of the Martin, when running near the piers and ap-

The Steamboat D. R. Martin.The Ferry-boat Moonachie.

proaching the ferry-slip, to be going at a rate of speed that rendered it impossible for her to stop her headway before reaching the ferry-slip. I do not say that it was negligence for her to come down sufficiently near to the piers, above the ferry-slip, to enable her to make her landing at Le Roy street; but I do say that it was negligence to approach that ferry-slip at such a rate of speed as to render it impossible for her to stop in time to avoid hitting a ferry-boat, in case one should happen to come out at that time. Her ability to pass the slip in safety, at the rate she was going, was made to depend simply upon the chance that no boat should be coming out; and she had no right to run that risk. A lower rate of speed would have enabled her to make her landing without risk of collision, and no necessity existed warranting the rate of speed at which she was running. How many miles per hour she was running may be a subject of dispute—I do not undertake to fix the number; but there is no disputing the fact that the moment the ferry-boat appeared at the mouth of the slip, all the bells, including the danger-bell, were pulled on board the D. R. Martin, but it was found to be impossible to stop her before reaching the mouth of the slip. Such a speed in that locality I hold to be negligence.

I find no fault in the ferry-boat, for the weight of the evidence is that she was passing out of the slip at the lowest rate of speed possible. If I found the fact to be, as is contended by the D. R. Martin, that the ferry-boat was moving out at her full speed or nearly so, I should consider her in fault likewise, inasmuch as the character of that locality and slip requires the greatest care on the part of the ferry-boat, in moving out of the slip. But the weight of the evidence is that in this instance the ferry-boat was moving out as slowly as was possible.

The Steamboat P. C. Schultz.

It is claimed that the ferry-boat was in fault for reversing her engines, and in endeavoring to get back into the slip, instead of going ahead when she saw the D. R. Martin. Several witnesses who saw the disaster express the opinion that there would have been no collision if the ferry-boat had kept on. The pilot of the Martin thinks that if the Moonachie had kept on instead of endeavoring to get back to the slip, he would have cleared her by twenty feet. But if it was a mistake in the pilot to back when he did, it was not a fault that renders the ferry-boat liable, because it was caused by the danger created by the close approach of the Martin at a high and improper rate of speed.

There must be a decision in favor of the libellants, in the first case, with an order of reference to ascertain the amount of the damage. In the second case, the libel must be dismissed, with costs.

For the ferry-boat, *Abbett & Fuller*.

For the steamboat, *P. Cantine*.

JULY, 1879.

THE STEAMBOAT P. C. SCHULTZ.

TUG AND TOW.—CONTRACT.—SAFE PLACE.—NEGLIGENCE OF MASTER.—
DELAY.—COSTS.

Where a tug going up the Hudson river with several boats in tow, could not land one of the boats at the dock where it was destined in the then state of the tide, and left it at another safe place, to await the return of the tug on

The Steamboat P. C. Schultz.

the next tide, and the boat having to be moved out of the way of other boats, was put by her master in a place where she took bottom before the next tide, and suffered damage for which action was brought :

Held, that it was not negligent in the tug to leave the boat in a safe place, where she did, to await the next tide ;

That it was negligent in the master of the tug to move his boat to an unsafe place, when there were other places open to him and known to be safe ; and the libel must be dismissed ;

That the failure of the tug to return at the next tide showed a willingness to disregard the welfare of her tow, for which she should be refused costs.

A boat left by her tug to wait for her, in order to complete the towing contract, at a place which though safe cannot be retained and from which the boat must move to an unsafe place, is not left in a safe place.

BENEDICT, J. The evidence is sufficient to show that the contract made on behalf of the P. C. Schultz was to tow the libellant's canal boat to Armstrong's dock, at Peekskill, but it was no part of the undertaking to place the boat there within any particular time. The weight of the evidence appears to be in favor of the assertion of the claimant, that when the tow arrived off Peekskill the tide had fallen so as to render it impossible then to place the boat at Armstrong's dock. This fact, however, did not render the performance of the contract impossible, or absolve the tow-boat from the obligation to take the canal-boat to Armstrong's dock. When the low state of the tide was found to render further progress towards Armstrong's dock impossible at that time, it then became incumbent on the tow-boat, if, because of having in tow other boats bound further up the river, it was not advantageous to wait near Peekskill for the next tide, to place the libellant's boat at an adjacent safe place, and upon the next tide take her to the dock at which it had been agreed that the boat should be taken. No breach of contract was therefore committed when the libellant's boat was placed at Roy Hook dump, to await the return of the tow-boat on the next tide, provided that was a safe place for the

The Steamboat P. C. Schultz.

boat to lie meanwhile. The evidence in regard to the character of Roy Hook dump as a safe place for a loaded canal-boat to lie is conflicting: but after careful consideration, I am satisfied that the boat could have remained at the dump in safety, if ordinary care had been exercised by her master. It is clearly shown that in the place where the canal-boat was left by the tow-boat there was abundant water for her safety, but subsequently the exigencies of another boat loading at the dump and outside of which the libellant's boat had been left compelled a change of position. If I was satisfied that the new position in which the libellant's boat was placed by her master, and where she afterwards sank, was as safe as any then and there available to her, I should consider the tow-boat responsible for the damage arising from the sinking of the boat in that place, because I am of the opinion that the tow-boat is chargeable under the circumstances with knowledge that the position she selected for the canal-boat was but temporary. A canal-boat left by a tow-boat to await the tow-boat's return in order to complete the towing contract, at a place which, although safe, cannot be retained, and from which the canal-boat must move to an unsafe place, is not left in a safe place.

In this instance it is proved by a witness called by the libellant, that the place to which the captain of the canal-boat moved his boat after the tow-boat had left, was one where she was certain to ground at the falling of the tide, and reasonable examination on his part, to say nothing of enquiry, would have informed him of the rocky nature of the bottom there. The case, as I view it, therefore, turns upon the question of fact whether, when the canal-boat was compelled to leave the place in which she was left by the tow-boat, there was another place there available to her where she could have remained in safety until the next tide. The

•

The Steamboat P. C. Schultz.

evidence upon this point indicates that the boat could, without difficulty or expense, have been anchored in deep water where she would have been safe, and also that she could have been placed alongside the other boats at the dump where she would not have touched bottom ; instead of which she was placed where, as the libellant's witness, Leach, says he knew she would sink, and where, in fact, she did sink, causing the damage complained of. Upon these facts, it must be held that the loss which the libellant has sustained was not caused by the failure of the tow-boat to perform the towing contract, but by the negligence of the master of the canal-boat in placing the libellant's boat in an unsafe place after the tow-boat had left.

Some stress has been laid upon the fact proved that the tow-boat having left the canal-boat at the dump on Friday morning, did not return until Sunday afternoon. If the disaster to the libellant's boat had been caused by the failure of the tow-boat to return in reasonable time for the purpose of taking the boat to Armstrong's dock, I should give a decree for the libellant ; but the fact is that the canal-boat sank before the next tide, so that if the tow-boat had returned in time for the next tide, nothing could then have been done by her towards completing her contract. Performance of the contract had then been rendered impossible, by the negligence of the master of the canal-boat in placing his boat where she would strike upon rocks and sink. The failure of the tow-boat to return on the next tide under the circumstances, therefore caused no damage. The sinking of the canal-boat was, however, unknown to the tow-boat, and her failure to return to the canal-boat until Sunday afternoon indicates a disregard on the part of the tow-boat of her obligations towards the canal-boat left by her at the

The Brig Gomez de Castro.

damage, which deserves condemnation and will be noticed by refusing costs.

If anything need be said in regard to the claim for breaking the rail when taking the canal-boat in tow, it is sufficient to remark that the damage claimed to have been done was very slight indeed and the proof respecting it not clearly in favor of the libellant.

The libel will be dismissed, but without costs.

For libellant, *Brown, Wm. & H. Co.*

For defendant, *Brown, T. & Benedict.*

JULY, 1879.

THE BRIG GOMEZ DE CASTRO.

CARGO.—NON-DELIVERY.—DRAINAGE OF SUGAR.—COSTS.

A cargo of sugar was shipped from Bahia to New York in bags. The sugar was green, and the drainage from it on the voyage excessive: the vessel also met with heavy weather. On discharging, many bags were found broken, and new ones were furnished and refilled. A quantity of sugar was also swept up from the hold, and sold by the crew with the master's knowledge.

The consignee libelled, claiming \$1,850 damage for non-delivery of cargo: *Held*, That he could only recover for the value of the sweepings sold.

A libellant who fails as to the most part of his claim, cannot recover costs.

BENEDICT, J. Upon the evidence the libellant can recover no greater sum than the value of the sweepings which the evidence shows were sold by the crew of the vessel.

The libellant having failed as to the most part of the considerable claim made by him against this vessel, is not entitled to recover costs. There may be a decree for twenty-

The Steam-tug Gorgas.

five dollars, being the amount for which the sweepings were sold by the junk man ; or either party may at his own expense have a reference to ascertain the value of the sweepings sold by the crew.

For libellant, *Owen & Gray*.

For claimant, *James K. Hill*,

Southern District of New York.

AUGUST, 1879.

THE STEAM-TUG GORGAS.

TUG AND TOW.—LIGHTS ON CANAL BOAT IN TOW.—INSPECTOR'S RULES.—
FERRY.

The tug G. having towed three canal-boats out of a slip at Jersey City into the river, all three on her port hand in the neighborhood of the ferry from Desbrosses street, in order to take one of the boats, the N., on the other side, her lines were slacked and she was dropped back till her stem was ten or fifteen feet from the sterns of the other two boats, and a line was made fast from her to one of the other boats. In this position the N. was run into by a ferry-boat crossing from New York to Jersey City. When the approach of the ferry-boat was seen, the master of the N. hailed the tug to go ahead, but the hail was not heard. The master of one of the other boats went forward abreast of the pilot-house of the tug and spoke to the master of the tug, but he failed to start his boat ahead in time to get the N. out of the way of the ferry-boat, and the owner of the N. filed a libel against the tug to recover the damages sustained by the N. The N. had no light on her at the time of the collision, and was not seen by the ferry-boat in time :

The Steam-tug Gorgas.

Held, That the place chosen by the tug in which to shift the canal-boat was not well chosen, being in the track of the ferry-boat, and that the master of the tug was bound to greater vigilance, therefore ;

That the master of the tug was not as vigilant as he should have been, in that he did not see the approach of the ferry-boat in time, and did not start ahead with his tug when warned to do so ;

That the tug was liable for the damages to the boat.

It seems that the rules of the inspectors throw the duty of seeing that a boat in tow has a light upon the steam-tug and not on the boat, and that there is no such duty on the part of the boat to have a light that the failure to have one constitutes negligence on the part of the boat as regards the tug.

CHOATE, J. This is a libel to recover for an injury sustained by libellant's canal-boat, the Charles J. Norton, by a collision with the ferry-boat New York, on the evening of the 11th of May, 1877, while the canal-boat was in tow of the Gorgas.

The libellant's boat with two other canal-boats, the O'Donnell and the Mary Dee, were lying together at a pier near the foot of Morgan street, Jersey City. These boats employed the tug Gorgas to tow them to Port Johnson. The tug came into the slip where they were lying lashed together, put her line on the middle boat, the O'Donnell, and backed out into the river, drawing them after her. When she had the canal-boats clear of the piers she came alongside of the Mary Dee, thus placing all three boats on her port side, the libellant's boat being outside. The tug and tow were then heading nearly across the river, but a little down stream, and were from two hundred and fifty to five hundred yards from the line of the piers. The tide was ebb, setting directly down the river. The night was starlight and clear, with very little wind. The three canal-boats were light. Having got the tow in this position the tug came to a standstill in the water, and ordered the libellant's boat to cast off her lines and fall back for the purpose of taking her

The Steam-tug Gorgas.

up on the starboard side. The lines were slackened and the libellant's boat fell back and her lines were passed on to the Mary Dee preparatory to her being taken up on the starboard side of the tug. As soon as she was far enough back to be well clear of the other boats, her stem being ten or fifteen feet from the sterns of the other boats, the line was made fast, connecting her with the Mary Dee. And at this stage of the manœuvre of shifting her from one side of the tug to the other, the ferry-boat New York, bound from her slip at the foot of Desbrosses street, New York, to her slip in Jersey City, which is a short distance below Morgan street, came in collision with her port side, about two feet from the stern, striking a glancing blow and breaking in some of her upper planks. The tug had her lights set and burning, as required by statute of a tug having other vessels in tow. There was no light on the libellant's boat.

It is alleged in the libel, as negligence on the part of the tug, that she left the canal-boat helpless and motionless for several minutes in the track of this ferry-boat, and that when libellant saw the ferry-boat coming upon a course likely to cause a collision, he called out to the master of the tug to go ahead; but he neglected to do so. The answer does not directly meet and reply to this charge of negligence in not responding to the call of the libellant to go ahead, but alleges that the tug and tow at the time of the collision had been lying dead in the water for about ten minutes; that the collision happened through no negligence or fault of the tug, but through the fault and negligence of the ferry-boat in not avoiding the canal-boat, in not having a careful look-out and pilot, and in not changing her course so as to avoid the canal-boat, and in not stopping and backing, and through the fault of the canal boat "in having no lights set, as required by law."

The Steam-tug Gorgas.

The evidence shows that while the ferry-boat was still at a considerable distance, those on the canal-boats observed that she was making such a course in relation to their position, that a collision with the libellant's boat was likely to take place, and that first the libellant from his boat and then the master of the O'Donnell shouted out to the master of the tug to go ahead, that the ferry-boat was running into them. The libellant's boat was so far astern that it is probable that his call was not heard, but the master of the O'Donnell ran forward on his boat to a point directly opposite to the pilot-house of the Gorgas and spoke to the master. His call was certainly heard. The master of the tug swears that he rang to go ahead immediately on hearing this call. On this point the testimony is conflicting. I think the preponderance of the testimony is, that he did not start his boat ahead as quickly as he could; that he had time enough to move her forward and thereby to have avoided the collision. In his testimony he suggests that he did not know, when he first heard the shout, whether the libellant's boat was made fast or not. The inference would be that any delay was excusable, because he had no assurance that if he went ahead he might not leave her behind in the river. There is nothing of this in the answer, and it seems to be an after-thought. On another point, the master of the tug is, I think, shown by the testimony to be in error. He places the tow a little *below* the ferry-slip, at the time of the collision. Other witnesses place it a little above, which is far more probable, considering the state of the tide. The ferry-boat, in making her slip, would naturally have kept a little above the slip as she approached it, to counteract the effect of the tide. The evidence shows that the tow stopped above the ferry-slip, and in executing this manœuvre of shifting the libellant's boat, the tug and tow were slowly drifting

The Steam-tug Gorgas.

down the river across the track of the ferry-boat. Upon the whole the testimony of the pilot of the tug seems to me less to be relied on than that of libellant's witnesses, some of whom are disinterested. The fact that he had not observed what was evident to those on the tow, the movements and course of the ferry-boat threatening a collision, shows inattention on his part. It is argued that he might assume that on such a clear night the ferry-boat would see the canal-boat and keep out of her way. Up to a certain point, undoubtedly, one vessel may and must assume that another approaching her sees her and will observe the common rules of navigation, and may properly act on that assumption; but it is equally the duty of every vessel to observe and be ready to take immediate action with reference to any indication that the approaching vessel is proceeding in disregard of those rules. It may have been negligence in the ferry-boat not to see and keep out of the way of the canal-boat; but it was the duty of the tug to keep her under such observation that if the ferry-boat gave any indications by her movements of not seeing her or of not keeping out of her way, she could take immediate measures for the protection of her tow. The testimony of the deck-hand on the tug who, before the collision, went aft to take the line of the libellant's boat when she should come up on the starboard side, does not greatly aid that of the master. He was not in a position to see the approach of the ferry-boat, and was busy with his duties there. The position chosen by the master of the tug for shifting this canal-boat was not well chosen. It was too nearly in the track of the ferry-boat, of which he must be presumed to have had notice, especially as the canal-boat had no light, of which also he had notice. The situation imposed on him the duty of great vigilance in so executing the manœuvre, which was undoubtedly a proper one, if ex-

The Steam-tug Gorgas.

ecuted in a proper place and manner, that the canal-boats should not be run down while lying motionless and helpless in the river. On the whole, therefore, I think the point is fairly made out against the tug, that she was negligent in leaving the libellant's boat helpless and motionless in the river, and in not going ahead and avoiding a threatened collision with the ferry-boat, of which the tug had sufficient notice, and which, if the notice given had been insufficient, she was bound to have observed.

It is no answer to this charge that the canal-boat had no light. There is no statute requiring her to have a light, and the rules of the supervising inspectors referred to in argument were not put in evidence, and if they are considered in the case, they seem to impose the duty of setting lights on vessels in tow upon the tug rather than upon the canal-boat. It is very probable that if there had been a light on libellant's boat, the ferry-boat would have seen it and kept out of her way. But it seems not to be such a duty on the part of a canal-boat, in the absence of a special requirement, as to make the failure to set a light in such a case negligence on her part towards the tug. The tug violated a plain duty towards the canal-boat in not keeping her out of the danger threatened, and this seems to me to have been, as between these two vessels, the immediate cause of the collision. The tug had notice of the absence of a light on her, and if that made her situation more hazardous, it only increased the obligation of the tug towards her.

Decree for libellant, with costs, and reference to compute damages.

For libellant, *E. D. McCarthy*.

For claimant, *W. R. Beebe*.

The United States v. Samuel J. Tilden.

SEPTEMBER, 1879.

THE UNITED STATES vs. SAMUEL J. TILDEN.

BILL OF PARTICULARS.—INCOME TAX.—LACHES.

The United States brought suit for an unpaid balance of income tax, alleged to be due from the defendant during a period of ten years. Among other defences, it was denied that the defendant's taxable income exceeded the sums on which he had paid the tax. The defendant moved for a bill of particulars, making affidavit that "he in good faith intends to defend the action, and that he is ignorant of the particulars of the claim made against him, and that it is necessary and material to his defence that he shall have rendered to him a bill of the particulars thereof, as he is advised by his counsel and verily believes," and the district-attorney made affidavit that "it is not in his power and to the best of his knowledge and belief not in the power of the plaintiff to state all the items or particulars which have to be considered in determining what defendant's taxable income was : "

Held, That the case was not a proper one in which to order a bill of particulars ;

The granting or refusing a bill of particulars is a matter in the discretion of the court under the circumstances of the particular case ;

In general, such a bill is not ordered where the matters of which information is thus sought are peculiarly within the knowledge of the defendant or more within the defendant's than the plaintiff's knowledge, or where, from the nature of the case, the plaintiff cannot be reasonably expected to be able to give the items of his claim with certainty.

Whether a delay from April, 1878, when the demurrer to some parts of the answer was finally disposed of, till September, 1879, when this motion was made, would be fatal to the application for a bill of particulars, if defendant were otherwise entitled to it, or whether such application should be denied because at an intervening term of the court the defendant's counsel had announced that they were ready and desirous to go to trial, *quære*.

CHOATE, J. This is a suit brought to recover of the defendant certain sums alleged to be due and owing from him

The United States v. Samuel J. Tilden.

for income taxes during the years 1863 to 1872 inclusive, over and above the amounts paid by him for his income taxes for said years respectively. The complaint alleges in separate counts for the several years the receipt of a certain sum of money as income in excess of the several specified sums, amounts and receipts which, by the law in force in said several years, were exempt from taxation as income, and in excess of the amount on which the defendant paid tax for such years respectively. The answer sets up certain defences growing out of the returns made by the defendant to the assessors and the assessment and other proceedings thereon, or assessments made without any return by the defendant during certain years, and the payment of the taxes so assessed with the penalties where the same were required by law in default of returns. These defences have on demurrer been held insufficient in law as an answer to the complaint. The answer also denies the receipt of any income, gains and profits for which the defendant was liable to pay an income tax in excess of the income on which he was assessed and paid the tax. The answer was filed June 23d, 1877. The demurrers were finally disposed of in or before April, 1878.

The defendant now moves for a bill of particulars of the plaintiff's complaint. He makes affidavit that "he in good faith intends to defend the action, and that he is ignorant of the particulars of the claim made against him in said complaint, that it is necessary and material to his defence that he shall have rendered to him a bill of the particulars thereof, as he is advised by his counsel and verily believes." He also makes affidavit that "the reason why this application was not sooner made, is that with reference to all preceding terms of the court since said answer was served, defendant has been advised by his counsel that the issue of fact herein

The United States v. Samuel J. Tilden.

could not then be brought to trial." In opposition to this motion, the district-attorney makes affidavit that "it is not in his power, and to the best of his knowledge and belief not in the power of the plaintiff, to state all the items or particulars which have to be considered in determining what defendant's taxable income for the several income years was; that he has filed a bill of discovery in the Circuit Court on behalf of the United States, to compel the defendant to make a disclosure thereof, and that said bill of discovery is now pending unanswered in said Circuit Court." The district-attorney also makes affidavit on information and belief to certain alleged misconduct of one of defendant's counsel with reference to certain books of account alleged to contain material evidence for the plaintiff in this action and which are said to have been improperly taken away in another district while a witness, was under examination in connection therewith.

This motion must be denied, upon the well-settled rules of practice, relating to the matter of bills of particulars.

The object of such a bill is to prevent a surprise upon the trial by giving the defendant reasonable information as to the details of the claim made against him, and the effect of ordering the bill is to limit the plaintiff's evidence strictly to the items of his claim as detailed in the bill. The granting or refusing of the order in each case is a matter in the discretion of the court under the circumstances of the particular case. In general, such a bill is not ordered where the matters of which information is thus sought are peculiarly within the knowledge of the defendant, or more within the defendant's than the plaintiff's knowledge, or where, from the nature of the case, the plaintiff cannot be reasonably expected to be able to give the items of his claim with certainty. In all such cases the granting of the order is either

unnecessary, or is likely to do more injustice to the plaintiff, than the refusal of the relief will do to the defendant. Such seems to me upon the affidavits presented, and considering the nature of the issue to be tried, to be the present case. The Government is not to be presumed to know what any man's income is, still less the several parts of which it is made up. Every man is to be presumed to know these things with entire certainty. While the officers of the Government may have such credible information as to a taxpayer's income as makes it proper to bring a suit to recover an excess of income tax due above that paid, that information may not be so specific or detailed as to enable the district-attorney in advance of the trial to set forth the items going to make up the income, with the certainty required in a bill of particulars. He may not be able, out of court and before trial, to obtain information from witnesses, who, under subpoena, may be compelled to disclose all the facts within their knowledge. Under our system of law, which allows one party to call the other as a witness, a party may rely for details on the examination of the other party as a witness in court. The affidavits in this case do not overbear or affect this presumption arising from the nature of the case. The defendant swears that "he is ignorant of the particulars of claim made against him." He does not swear that he is ignorant of the particulars of his income during the periods in question. All that he is ignorant of, is what receipts of money by him during those periods the district-attorney intends to put in evidence against him, and to claim as constituting taxable income. This may well be, but he is to be presumed to know and to have an account of all the sums of money he did receive, and as to those it may, I think, well be assumed that he or his counsel can readily anticipate which of them may be claimed to be in whole or

The United States v. Samuel J. Tilden.

in part taxable as income. I do not think that, practically, the defendant is in any danger of being surprised upon the trial by the attempted proof on the part of the Government, through misinformation or otherwise, of the receipt of moneys, during the periods in question, which he did not, in fact, receive. If such proof should be offered, it would seem to be a matter easily defended against, or in the event of a genuine case of surprise of this kind, the defendant would not be without relief, as the trial can be delayed for the production of the necessary proof on his part. So as to the other points suggested, that may possibly arise, as, for instance, conflicting claims between the parties, as to what part, if any, of moneys received are taxable as income, or what deductions might be properly made; while a full bill of particulars, if in the power of the Government to give it, might save considerable trouble and labor to the defendant and his counsel in preparing for trial, it seems not to be so necessary to prevent a surprise in meeting the case, that the Government may put in evidence, that the defendant is in danger of injustice from the want of such a bill. On the other hand, the proof is that the plaintiff is, in fact, unable to furnish such a bill. Nor is it to be inferred from this fact, admitted by the district-attorney, that the suit is a mere fishing suit, brought for a general inquisition into the private affairs of the defendant, as suggested by the learned counsel for the defendant, who urge that the court should, by granting this motion, discountenance such a suit. As pointed out above, a plaintiff may have credible information which fully justifies an action, though that information be not such as enables him to make a bill of particulars. And it is not the office of a bill of particulars merely to discover the *evidence* on which a plaintiff relies, or the information on which his action is brought. The court must assume as to all parties

The United States v. Samuel J. Tilden.

before it, whether plaintiff or defendant, until the contrary appears, that they are acting in good faith, and that their pleadings, which are in the proper and accustomed form, are not frivolous nor intentionally false, but are intended to bring to trial the claim or defence set forth therein. That presumption holds as to the parties to the present action; and, moreover, in respect to the plaintiff, the complaint being made on its behalf by a sworn officer of the Government, it must be further presumed that what he has done, he has done rightfully, in the due course of his official duty, and under the responsibility of his oath of office, upon the information presented to him. And while, of course, no deduction adverse to the truth of defendant's answer is to be drawn from this fact, yet this presumption in favor of the regularity of official conduct, would prevent the court from drawing the inference claimed by defendant's counsel from the alleged inability to furnish a bill of particulars, since such inability is not necessarily inconsistent with good faith in bringing and prosecuting the plaintiff's action.

I have not found it necessary to consider whether, if the defendant were otherwise entitled to a bill of particulars, the motion should be denied on the ground of delay in applying for it, or because at the last April term of the court the defendant's counsel, when the case was called for trial, answered that they were ready, and would prefer to go to trial, but yielded to the district-attorney's application for delay, that he might have the opportunity to file a bill of discovery in the Circuit Court, a fact within the knowledge of the court, though not stated in the affidavits. It would seem that the position then taken by counsel was inconsistent with the advice now given by them to the defendant, and in such a case perhaps it should be shown that since the case was declared to be ready, some further information received, or at

The Steamboat Minnie R. Childs.

least some new view taken by counsel, suggests a danger in going to trial, not before seen. But however this may be,—and this difficulty, if real, might be obviated by further affidavits,—I prefer to put the decision of the motion on the grounds above stated.

I have also disregarded the alleged misconduct of one of defendant's counsel, which I do not think has any relevancy to this motion.

Motion denied.

For defendant, *T. Harland* and *A. J. Vanderpoel*.

For the plaintiff, District-Attorney *S. L. Woodford* and Assistant District-Attorney *S. B. Clarke*.

OCTOBER, 1879.

THE STEAMBOAT MINNIE R. CHILDS.

LIEN.—DOMESTIC VESSEL.—MATERIALS.—PRIORITIES.

Materials were furnished in the State of New York to a vessel owned in the state, by three parties, F., D. & M. Specifications of lien were filed, as required by the statute of New York, first by F., second by M., and third by D. A few days after D. had filed his specification of lien, he filed a libel against the vessel to enforce his lien and the vessel was seized under the process. F. next filed a libel against her, and lastly M. filed a libel also. The vessel being sold and the proceeds not being sufficient to pay all the claims, the question of priority was brought before the court :

The Steamboat Minnie R. Childs.

Held, That the order of the filing of the specifications did not determine the order of the attaching of the liens :

That the rule that claims should be paid in the order of the filing of the libels was too well settled to be disturbed in this District, notwithstanding the authorities elsewhere in favor of a payment *pro rata*.

CHOATE, J. The libellants in these three several suits have furnished supplies and materials to the steamboat Minnie R. Childs, a domestic vessel, and their libels were severally filed to enforce liens therefor under the statute of the State of New York. The first libel filed was that of Delamater, June 26, 1879, the second that of Fairbanks, June 28, 1879, and the third that of McCurdy, July 1, 1879. The processes were issued and attachments of the vessel thereupon were made in the same order of time. The vessel has been sold and the proceeds are not sufficient to pay in full the amounts found due to the several libellants by their decrees, and the question is how the proceeds shall be distributed.

The statute of New York (Act of April 24, 1862) provides that "whenever a debt amounting to fifty dollars or upwards as to a sea-going or ocean-bound vessel, or amounting to fifteen dollars or upwards, as to any other vessel, shall be contracted by the master, owner, &c., of any ship or vessel or the agent of either of them within this state for either of the following purposes, [enumerating them] such debt shall be a lien upon such ship or vessel, her tackle, apparel and furniture, and shall be preferred to all other liens thereon, except mariners' wages." Section 2d provides that, "such debt shall cease to be a lien at the expiration of six months after the said debt was contracted, unless at the time when said six months shall expire, such ship or vessel shall be absent from the port at which such debt was contracted, in which case the said lien shall continue until the expiration

The Steamboat Minnie R. Childs.

of ten days after such ship or vessel shall next return to said port ; and in all cases such debt shall cease to be a lien upon such ship or vessel, whenever such ship or vessel shall leave the port at which such debt was contracted, unless the person having such lien shall within twelve days after such departure cause to be drawn up and filed specifications of such lien," &c. The act directs that these specifications are to be filed in the clerk's office of the county in which the debt was contracted. It also provided machinery for the enforcement of the lien by the issue of a warrant to the sheriff of the county and subsequent proceedings in the state courts resulting in the sale of the vessel. By section 19 it was provided that " upon the distribution of such proceeds the various claims exhibited, which are found to be subsisting liens upon such vessel or the proceeds thereof, according to the provisions of this act, shall, with their respective costs, expenses and allowances, be ordered to be paid out of such proceeds, in the order of the delivery of the respective warrants to the sheriff."

It is insisted on behalf of the libellants Fairbanks and McCurdy that the claims should be paid in the order in which the specifications were filed ; that the special provisions of the act relating to the order of distribution are not binding on this court ; that they cannot be applied because there are no warrants issued to the sheriff ; and that the liens are created by the filing of the specifications and the claims thereby become, in the order in which they are filed, liens against the vessel, each subsequent lienor taking an interest subject to such prior liens as have already attached by virtue of the act. It is further insisted by the libellant McCurdy, that if this is not the proper rule in this case, yet that the rule that has been followed in this district of distributing proceeds among libellants of the same class in

The Steamboat Minnie R. Childs.

the order in which their libels were filed is erroneous and that the true rule is that the proceeds should be distributed *pro rata* without regard to the time of filing the libels.

In this case the specifications were filed by Fairbanks, June 14, 1879, by McCurdy, June 16, 1879, and by Delamater, June 17, 1879.

I see no ground whatever for the claim that the filing of the specification creates the lien, or that it first attaches to the vessel upon such filing. On the contrary, the statute is explicit that the lien exists before the filing of the specification, and upon the contracting of the debt. The filing is made necessary simply to prevent the lien already existing from being discharged. It has been held that the lien given by such a statute is held subject to the limitations contained in the statute as to its duration. (*The Edith*, 94 U. S. 518, 522.)

In respect to those parts of the statute which provide a remedy *in rem* in the state court and direct the distribution of the proceeds with reference to the order in which the warrants issue to the sheriff, it seems to me that they are not to be regarded as limitations upon the duration of the lien or conditions of its enjoyment. They cannot be literally applied, since there are and can be no such warrants issued. It seems to me that they fail altogether, and can have no application since the entire remedial machinery provided has been held to be unconstitutional and void. (*The Lottawanna*, 21 Wall. 580.) Nevertheless, the liens declared by the statute, with what may properly be regarded as the limitations and conditions attached thereto, remain and are enforceable in this court. It is argued on behalf of the libellant Delamater that the issue of the process of this court is so far analogous to the warrant to the sheriff provided for by the act, that this part of the act is still controlling and ap-

The Steamboat Minnie R. Childs.

plies to the process of this court under which the vessel is arrested. That provision may have been adopted to conform the remedies of lienors to those of lienors whose claims were enforceable in the Admiralty Court. Very probably this is so. And yet it seems to me that this is not one of the conditions attached to the lien itself as an essential part of it, but that it has to do with the remedy only. The same section defines the costs to be paid in the same order of priority to be the costs allowed in suits at law by the laws of the state. This is certainly not of the essence of the lien, nor controlling in this court.

It is still insisted on behalf of the libellant McCurdy that the ordinary rule of the Admiralty Court, which distributes the proceeds in the order in which the libels were filed, ought not to be applied here because the reason on which it rests does not apply. It is argued that the rule is based on the principle that the first libellant has the preference because he takes the first measure to enforce his claim, and that here the filing of the specification is the first act towards enforcing the claim. There seems to be no force in this suggestion, since the filing of a specification is not a measure taken for the enforcing of the lien or claim, but simply to keep it from expiring by lapse of time.

The lien given by the state statute is in effect only a right to have the vessel applied to satisfy the debt, a right similar in its nature to a maritime lien, and must be enforced as such. The rule giving priority to the lienors in the order in which their libels are filed is too well established in this district to be now questioned in this court, notwithstanding the very considerable weight of authority in favor of a different distribution. (*The Globe*, 2 Blatchf. 427 ; *The Triumph*, Id. 433 note. See *The America*, 6 Law Reporter, N. S. 264 ; *The Fanny*, 2 Lowell, 508.)

The Schooner Two Marys.

The proceeds should be distributed among the libellants in the order in which their libels were filed.

For Delamater, *N. A. Halbert.*

For Fairbanks, *D. McMahon.*

For McCurdy, *R. D. Benedict.*

OCTOBER, 1879.

THE SCHOONER TWO MARYS.

DISCHARGE OF ATTACHMENT.—OPPOSING CLAIMANTS.—RETAKING PROPERTY
INTO CUSTODY.—PRACTICE.

A libel was filed against a domestic vessel on January 25th, 1879, to recover for supplies furnished to her. Process was issued to the marshal, who returned that he had attached the vessel. At the libellant's request, no keeper was put by the marshal on board the vessel, which was then undergoing repairs at City Island. No notice to appear was ever published. On Sept. 16, 1879, on motion of the libellant's proctor, an order was made that the marshal take the vessel into his custody under the original process and put a keeper on board. The marshal did so, and removed the vessel from City Island to a pier in the East River. H., the shipwright, who had been repairing her, appeared as a claimant, averring that when the vessel was seized by the marshal, he was in possession of the vessel, on which he claimed a common law lien. He gave a bond under the Act of 1847, and an order was made in the usual form for the release of the vessel and the marshal gave him a notice to the keeper on the vessel to discharge her, with which he went to the vessel. C., the master of the vessel, who was also one-sixteenth owner, was on board and so was the proctor for the libellant. A controversy arose between them which resulted in H.'s being arrested by a police officer and compelled to leave the vessel. He had shown the marshal's notice to the keeper, but refused to leave it with him or to

The Schooner Two Marys.

show it to the other parties. After his arrest the keeper left the vessel, leaving the vessel in the possession of the master. H. then moved the court for an order directing the marshal to retake the vessel and restore her to him. The master opposed the motion, claiming that he and not the alleged claimant was in possession of the vessel when the marshal retook her under the order of Sept. 16th. The libellant also opposed the motion, denying that he had had notice of the claimant's application to bond the vessel. Pending the motion the court made an order directing the marshal to take the vessel into custody and hold her till the determination of the motion :

Held, That it is the duty of the court, on the dissolution of an attachment against a vessel under its process, to cause the vessel to be restored to the party who was in possession at the time when she was taken under the process :

That, where there are two different parties, each claiming to have been so in possession, the marshal ought not on the dissolution of the attachment to deliver her to either without the order of the court ;

That, in this case, the order for the release of the vessel had not been duly executed and the court therefore had jurisdiction to order the marshal to take her into his custody again under the original process ;

That the libellant's default as to the bonding of the vessel should be opened and he have leave to file objections to the right of H. to appear as a claimant ;

That new publication of notice to all parties to appear be had, on the return of which C., the master, would have the opportunity to appear and aver his possession at the time of seizure ; and the question between him and H., could be then properly determined.

CHOATE, J. This is a libel for supplies and materials furnished by David W. McLean to a domestic ship for which a lien is claimed in the libel under the law of New York. The libel was filed Jan. 25, 1879. On this libel a monition was issued, returnable Feb. 11, 1879, of which the marshal made return that on the 29th of January, 1879, he "attached the schooner at Hawkins' dock, City Island." An order for publication of notice for all persons in interest to appear and intervene was made on the 25th of January, but no publication has been made. It appears by affidavit that at the request of the libellant the marshal put no keeper on board at the

The Schooner Two Marys.

time of the service of the process ; that the vessel was then hauled out of the water undergoing repairs and not in a condition to be navigated at all or to float in the water. Sept. 16, 1879, on motion of the libellant's proctor an order was made that the marshal take the schooner into his custody under the original process and place a keeper in charge. Thereupon the marshal resumed the custody of the vessel and removed her to a pier in the East River. On the 20th of September, one Hawkins appeared as claimant, averring in his claim that at the time of the seizure he was in possession of the schooner, reconstructing her, and claiming a common law lien therefor to the amount of \$5,000. He offered a bond under the Act of 1847, in double the amount of libellant's claim and gave notice to libellant's proctor of the justification of his sureties for the 22d of September. The libellant's proctor did not appear and the bond was approved and an order was made in the usual form for the release of the vessel on the same day. The marshal thereupon gave to the claimant's proctor a notice to the keeper to discharge the vessel. The claimant took a tug and proceeded with this notice to the vessel, exhibited the notice to the keeper but declined to give it up. He met there the libellant's proctor, and one Crowley, who claims to have been previously appointed master of the schooner and who also appears to be the owner of one-sixteenth part of her. It is very difficult to ascertain with certainty from the conflicting affidavits, what occurred on the vessel at that time. It is sworn by witnesses on behalf of the libellant and Crowley, that the claimant did not demand the delivery of the schooner to him; but I am satisfied that the libellant's proctor and Capt. Crowley, as well as the keeper, understood that he was there for the purpose of taking possession of the schooner upon the discharge of the attachment. A controversy appears to have arisen, Crowley and

The Schooner Two Marys.

libellant's proctor insisting that Hawkins had no right to be there. The result of this controversy was that Hawkins, the claimant, was by the procurement of these parties or one of them taken under arrest by a police officer and compelled to leave the vessel. He seems to have refused to exhibit his authority to receive the vessel to libellant's proctor, but the evidence shows concert of action between the libellant and Capt. Crowley, the libellant now claiming to be the principal owner and Crowley as master claiming to act by his appointment and under his directions. After Hawkins left the vessel the keeper went away, leaving Capt. Crowley on the vessel, who claims now to have been left in possession by the discharge of the attachment. The result is in reality that the libellant has, or appears to have through Capt. Crowley, possession of the vessel; and through her seizure on his libel and her subsequent discharge, the claimant, if he was the party in possession, has been dispossessed. This is a motion on behalf of the claimant that the marshal retake the vessel and restore her to him, and for other relief. The libellant and the said Crowley appear to oppose the motion.

Although the customary order for discharging an arrest of the vessel is simply that she be released from custody, yet it is the duty of the court, on the dissolution of an attachment under its process, to cause the vessel to be restored to the party who was in possession at the time the officer of the court took her into custody. The process of the court in its execution and discharge must not be used as the means indirectly of taking a vessel from one party and giving it to another. In the case of *The Neptune*, 1 Hagg. Adm. p. 132. Sir John Nicholl says: "Had bail been given to the action for wages, the ship would be delivered up, upon the removal of the arrest, to the party previously in possession, whoever he might have been." Mr. Dunlap in his treatise says: "In

The Schooner Two Marys.

the Admiralty Courts of the United States, in all civil causes, except perhaps those of bottomry and by hypothecation, it is usual for the court upon application to deliver the property to the claimant from whose possession it has been taken, upon bail or stipulation with ample security, conditioned in some cases for the restoration of the property, in others for the payment of the amount which may be decreed to the libellant and his costs." Dunlap's Adm. p. 166. I cannot agree with the counsel for the libellant that the marshal's duty is simply to withdraw his keeper and leave the vessel, without regard to whether she thereby falls into the hands of her owners, or strangers, or river thieves. It is his duty under these authorities upon the termination of his custody to replace her in the possession of the party from whose possession he took her. An admiralty suit *in rem* proceeding in proper course is a suit against all the world, against whoever has or claims to have any interest in the vessel, and where the proper notice is given, including the publication of notice to all persons interested to intervene according to the rules and practice of the court, all persons having an interest who do not appear are in default; and a claimant, who does appear and gives bond for value or under the Act of 1847 for double the amount of libellant's claim and whose right to intervene as claimant is not challenged by the libellant or some other party intervening, is to be held to be by the acquiescence of all the parties to the suit the party entitled to the possession. A claim thus made is an application to the court for the possession of the vessel on giving bail. Thus in the case already cited, the court says: "The warrant of arrest calls upon all persons who have an interest to appear and show cause, and if the party in possession at the time the warrant was executed is no longer in possession, it is, I repeat, his own default; he has, by not appearing to give bail,

The Schooner Two Marys.

acquiesced in being dispossessed and has thus allowed the proceeds arising upon the sale of the ship to come into the registry of the court." 3 Hagg. 132.

Now in this case it appears that there are two parties who claim to have been in possession at the time the marshal took the vessel under the process of the court, the claimant Hawkins, who has appeared, and the captain or the alleged captain and owner Crowley, who has not appeared as claimant but only to resist this motion. If publication had been made and the default of all persons not appearing had been entered, Crowley could not dispute the right of the claimant Hawkins to the possession of the vessel upon discharge of the arrest. But there having been no publication, I do not think he is in default, and he should have an opportunity to contest Hawkins' right to appear as claimant, which is based upon an alleged actual possession of the ship as a lienor at the time of the arrest. The libellant cannot of right now dispute Hawkins' right as claimant, because he made no objection to his appearing as claimant, when served, as the record shows that he was served, with notice of the justification of the claimant's sureties, which is in effect a notice of Hawkins' appearance as claimant. But as it appears by affidavit that the notice of justification did not in fact reach the libellant's attorney till after the time fixed therefor, he is entitled to have that default opened and now to make objections to Hawkins' appearance and claim. When such objections are made the practice is to refer the question to the clerk or a commissioner.

But the course pursued in this case was irregular. The owners of the vessel not having appeared nor being in default, no order should have been made which in effect gives up the vessel to a party claiming to be not the owner but merely in possession as a lienor. If the libellant refused and

The Schooner Two Marys.

neglected to cause that publication to be made, the claimant should have moved that the libel be dismissed for want of prosecution and to have compelled the libellant to go on with his suit and procured the default of the owners, or their appearance, or he would have been allowed to have the publication made on his own motion. Still, the order that was made was not properly executed. If it required the delivery of the vessel to any party it was to the party who had appeared and had been allowed to bond the vessel. But if in such a case the marshal finds that there are contesting parties claiming possession, I think ordinarily he ought not to deliver her to either without the direction of the court. Such a question should be settled before the release of the vessel from custody. It is most unseemly that the retreat of the marshal should be the signal for rival claimants to rush in and contest the possession of the ship with each other on her decks. I think, therefore, that the order of the court for the release of the vessel has not been duly executed. The marshal ought not to have withdrawn his keeper after a party who had been admitted to appear and bond the vessel and who had exhibited to him the order for her release had been excluded from the ship.

It is claimed however that the court has now no jurisdiction to retake the vessel; that the marshal having left her in the possession of Crowley, who thereupon took possession, cannot be disturbed except by an action for that purpose. But it seems to me competent for the court to order the marshal to retake the vessel as under his original process, if the order for her release has not been duly executed. The vessel was in the custody of the court and that custody has never been properly and lawfully terminated. And as she remains within the jurisdiction, and as she is still in the hands of the party to whom she was improperly delivered and who

The Schooner Two Marys.

actively, but under a mistake as to his rights procured such improper delivery, and no new rights appear to have intervened, I am of opinion that the court has power to direct the marshal to resume the custody. In fact, pending this motion, an order was made requiring the marshal to take her again into custody and hold her till the determination of this motion, and she is now held under that order. (See *The Union*, 4 Blatchf. 90.)

The proper order to make seems to be that the order for the release of the vessel be vacated, as improvidently granted before a publication and default; that the marshal continue to hold her under his original process; and that the libellant's default be opened and he be allowed to file objections to Hawkins's appearance as claimant. A new order of publication should be made, the return-day having passed.

If Crowley voluntarily appears as claimant or comes in upon the return day of the notice by publication, he will then have the rights of any claimant, averring his possession at the time of seizure, to apply to the court for leave to bond the vessel, and the question of possession between him and the other claimant, Hawkins, can be properly tried. A great deal of the evidence by affidavit has been directed to the points that the libellant's claim is not such as gives him a lien enforceable in this court, and on the other hand that Hawkins had no common law lien and therefore no right to the possession of the vessel, as against the owners, because he has been fully paid, and because the work was done on the personal credit of the libellant and not on the credit of the vessel. These questions cannot be now entertained. They cannot be tried on affidavits. The first is an issue to be tried in the cause, if properly raised by the pleadings. The second may perhaps be properly inquired into upon

The United States v. Samuel J. Tilden.

trial of the objections that may be filed to Hawkins's appearance as a claimant.

Let an order be entered in conformity with this opinion.

For the motion, *Geo. A. Black.*

Opposed, *H. B. Kinghorn* and *Thos. W. Wyatt.*

OCTOBER, 1879.

THE UNITED STATES vs. SAMUEL J. TILDEN.

DEPOSITIONS *de bene esse*.—PRODUCTION OF BOOKS AND PAPERS.

A witness examined *de bene esse* under U. S. R. S. § 863, may be compelled to produce books and papers in his possession which would be material and competent evidence for the party calling him, upon the trial of the cause, but he cannot be compelled to produce his books and papers merely for the purpose of refreshing his memory.

CHOATE, J. On the 28th day of October, 1879, the district attorney took out a *subpœna duces tecum* directed to James B. Colgate, requiring him to attend on the 29th day of October, at 9 o'clock A. M., before a Circuit Court commissioner, named therein, to give evidence *de bene esse* in this cause on the part of the plaintiff, and requiring him also to have with him books and papers described as follows: "All and singular, the books, papers, writings and documents now in your custody or under your control, which show or in any manner relate to any gains, profits or income, made, gained,

The United States v. Samuel J. Tilden.

had, derived or received by, for, or on account of Samuel J. Tilden, the defendant, at any time between the first day of January, 1862, and the 31st day of December, 1871." This subpoena was issued from the clerk's office upon the filing of an affidavit of one H. H. Mason, that he knew the said Colgate and that on the 28th day of October, 1879, the said Colgate told him that he was going to Europe in a few days. On the 29th of said October, at the hour named, the said Colgate appeared before the commissioner and his examination *de bene esse* was proceeded with, the attorneys of both parties to the suit attending. He testified that during the period named in the subpoena his firm of Trevor & Colgate had some transactions with the defendant in the buying and selling of stocks; that they bought and sold stocks on defendant's orders; that he did not remember any particular orders; that he thought it probable and had no doubt that they had such transactions for the defendant in the stocks of the Pittsburgh, Fort Wayne and Chicago Railroad Company during the said period, but that his recollection was not clear; that he had no recollection as to the number of shares purchased or sold; that he did not recollect any such transactions in any other stock but had no doubt there were others. The witness was asked whether the stock was purchased for the defendant alone or for him in connection with somebody else, and he answered that he should have to refer to his books to find out. He was asked what books he had got by which he could refresh his memory on that subject, and he answered, the books of that date, if they could be found; that he presumed the ledgers would be the principal books and that he presumed that there were other books that might throw light on the subject, the cash books; that these were the only books he knew of to refresh his memory by; that these, the ledgers and the cash books, were the

The United States v. Samuel J. Tilden.

principal ones. Being further examined as to the books required for this purpose of refreshing his memory, he said that he could refer from one book to another, and that he could not tell what books he would want until he got at it. He testified that he kept books that might be called daily blotters, and which he called cash books; that he did not know whether he kept books called daily blotters; that he did keep books called cash books, and journals, memorandum books, in which purchases and sales of stocks were originally entered. All the foregoing questions related to books kept in the years 1862 to 1871, inclusive. He further testified that he did not know whether the books above referred to had been preserved; that if he was going to search for them he would look in the attic; that all such books, if preserved, were kept in the custody of his present firm of James B. Colgate & Co., successors to Trevor & Colgate. Being asked whether the defendant advanced any money for the purchase of the Fort Wayne, etc., stock above referred to, he answered that he could not tell without examining his books; that he presumed he did; that if his firm purchased any of said stock in which the defendant was interested, it was about the time of a reported lease of the railroad in the year 1869. Being asked if his firm sold at a profit any of this stock in which the defendant was interested, he said he could answer the question after an examination of his books; that he could not answer it now. At this stage of the proceeding the plaintiff's counsel requested the witness to produce all the ledgers, journals, memorandum books of the purchase and sale of stocks and daily blotters, cash books and check books which relate, in any way, to the purchase and sale of certain specified numbers of shares of the stock of the Pittsburgh, Fort Wayne and Chicago Railway Co., giving certain dates between March 4th and April 3d, 1869,

The United States v. Samuel J. Tilden.

with a certain number of shares for the several dates. The proceeding was then adjourned to October 30th, 10 A. M. On the morning of October 30th, 1879, the district attorney took out another *subpœna duces tecum* directed to the witness and requiring him to appear before the same commissioner on the 30th of October, at 10 A. M., as a witness on behalf of the plaintiff, and to have with him books and papers described as follows: "All and singular, the daily blotters, memorandum books of the purchase and sale of stocks, journals, cash books, check books and ledgers kept by or for the firm of Trevor & Colgate during the period commencing on the 1st day of January, 1869, and ending on the 31st day of December, 1869, now in your custody or under your control, and all books, papers, writings and documents now in your custody or under your control, which show or in any manner relate to the purchase and sale of, and the disposition of the proceeds of the sale of the following numbers (or thereabouts) of shares of the stock of the Pittsburgh, Fort Wayne and Chicago Railway Company, purchased on or about the following dates," giving the same dates and numbers of shares given in the foregoing request to produce.

The witness attended at the time to which the proceeding had been adjourned and the counsel for both parties appearing, his examination was resumed. He admitted that he had been served with the subpœna last referred to, and declined to produce the papers referred to therein under advice of counsel, denying the right to compel their production. At the request of the district attorney the counsel for the plaintiff and the witness appeared before the court, and argument was heard on the question whether the witness was bound to produce the papers described in the second subpœna.

The United States v. Samuel J. Tilden.

No objection has been taken to the shortness of the time allowed for the production of the books and papers, nor to the sufficiency of the preliminary proof by affidavit on which the subpoena was issued. The district attorney conceded on the argument that the books and papers were required, not because they are competent evidence in the cause, but because they are necessary for the purpose of refreshing the recollection of the witness in respect to facts pertinent to the issue in the cause. It is conceded that the books of the witness could not be used as evidence in the cause.

It is insisted on behalf of the witness: (1st,) that under Rev. Stat. § 863, the court has no power to compel by *subpœna duces tecum* the production of books and papers of the witness upon an examination *de bene esse* before trial; (2d,) that if such production can be compelled at all, the proceedings must be according to the provisions of the New York Code of Civil Procedure, which requires by § 867 for such production of books by a witness upon a trial or hearing, special application to and order of the court and a notice of a given number of days; and (3d,) that if in any case under R. S. § 863, a *subpœna duces tecum* will issue, it will not issue to require the production of books and papers merely to refresh the recollection of the witness upon his examination.

1. Upon the first point it is argued that the court has no power in the premises except what is given in R. S. § 863; that this only provides that in the cases specified, a person may be compelled to appear and testify; that this section contains no provision authorizing the party taking the deposition to require the production of books or papers; that in §§ 868-870, regulating the taking of depositions under a commission issued by a Federal Court, special provisions are made for the production of books and papers by the witness upon proof to the satisfaction of the court that

The United States v. Samuel J. Tilden.

a necessary case exists therefor; that it is unjust and oppressive to require a third party, having no interest in the suit, to produce upon the mere call of one of the parties by a subpoena, any or all of his private books of account and papers, often to his great inconvenience, the derangement of his business and possible injury from the exposure of his private business affairs. Attention is called to the fact that among the magistrates before whom the witness may be thus summoned, are notaries public and some other officers having little or no judicial character or experience, and that, by the settled construction put on this and similar laws for the taking of testimony out of court, the magistrate taking the same has no discretion as to the reception or rejection of testimony, but must take whatever is offered, thus greatly increasing the risk of injury to the witness and his affairs. And this argument, from the inconvenience of the thing, is urged as a reason for the strict construction of this section in this particular and against a construction which would involve these mischiefs. It is further argued from the careful provisions of law designed to protect *parties* from an improper inspection of books and papers, that no such right to require the production of those of a witness in this loose way and without special proceedings for that purpose can exist, the argument being that it cannot have been intended that indifferent third persons, having no interest in the controversy, shall have less protection in this respect than parties to suits.

The question is one of great importance and no decisive authority is cited on either side. In the case of *In re Peck*, 3 Blatchford 113, Judge Betts expressed a doubt whether upon the examination of a witness *de bene esse* under the 30th section of the judiciary Act of 1789, of which R. S. § 863 is a re-enactment, there was any power to compel the production

of books and papers. The case did not call for a decision of this point. I have given the question as full consideration as a very limited time for examination will allow, and have reached the conclusion that under this section it is competent for the court to issue a *subpœna duces tecum* to compel the production, upon the examination, of books and papers which would be competent evidence in the cause.

This provision for the examination of witnesses *de bene esse* before the trial, first enacted in the Act of 1789, has been said to be a novelty in legislation. Until a statute of the first year of William IV. (1831), there was no English Act of general application giving parties in common law actions this relief against the probable loss of testimony from the absence or death of witnesses. Prior Acts, beginning in the reign of George III., gave partial relief, limited mostly to the taking of testimony of persons in the remote colonies or dependencies of the realm. Prior to this more recent statute, the courts of common law, impressed with the hardship and injustice resulting from such loss of testimony, forced parties to consent to the taking of testimony by postponing causes, refusing to enter nonsuits or judgments in case such consent was unreasonably declined, and by other like rude devices. The power to issue commissions for the taking of testimony of witnesses, except in foreign countries, had a very limited application within the kingdom and afforded no sufficient protection against this evil. (See the English Cases and Statutes, 2 Phillipps on Evid., 4th Amer. Ed. p. 843, *et seq.*) In New York it was not till after this enactment by Congress that any such statute was passed, but the practice in substantial conformity with the statutes afterwards passed was recognized as proper, independently of any statutory authority. (See *Mumford v. Church*, 1 Johns Ca. 147; *Sandford v. Burrell*, Anth. N.P. 184; *Jackson v. Kent*,

The United States v. Samuel J. Tilden.

7 Cow. 63; *Wait v. Whitney*, *Id.* 69.) Indeed the first statute in New York is declared by the revisers to be founded on these early cases. (1 R. L. 455.) The general course of proceeding was by a special application to the court and an order for the examination based on proof of the essential facts making the relief necessary, and not by the issue of a *subpœna* properly so called.

The purpose of this Act of Congress undoubtedly was to provide a convenient and effectual remedy for this possible failure of justice from the anticipated loss of material testimony, and also for the relief of witnesses living at such distance from the place of trial that they could not reasonably be required to attend in person, which reasonable limit of distance was fixed at a hundred miles, although it was probably competent for Congress to authorize the summoning of a witness to attend the trial from any part of the United States. And the statute provided that "whenever the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of every such person may be taken *de bene esse*," etc. "Every person so deposing, as aforesaid, shall be carefully examined, etc., and sworn to testify the whole truth," etc. "And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court." (1 Stat. at Large, p. 88.) It is impossible, I think, to escape the conclusion that the purpose of the statute was to give parties, *in all substantial respects*, the full benefit of the testimony of witnesses to material facts,

The United States v. Samuel J. Tilden.

whose testimony they were liable to lose from age, infirmity or departure from the country, and also of witnesses living at a greater distance from the court than one hundred miles, who, for their own convenience, were to be excused from attending. The statute thus debars the parties from calling into court witnesses residing more than one hundred miles from the place of trial, even though living within the jurisdiction and, but for the statute, within reach of the *subpœna* of the court. This extension of the provision to distant witnesses very clearly requires, as it seems to me, that a construction should be given to the statute which shall not substantially deprive the parties of the benefit of their testimony. And considering the very large proportion of civil causes in which the testimony of witnesses, respecting books and writings in their possession and material to be put in evidence on the trial, is absolutely essential to the proper enforcement of the rights of one party or the other, the statute would, as it seems to me, fail of its intended purpose and effect if the parties were debarred by it from the compulsory production by witnesses more than a hundred miles from the place of trial, of papers material as evidence in the cause. While the statute, as being in derogation of the common law, must be strictly followed as to the course of procedure prescribed by it, (*Bell v. Morrison*, 1 Peters 355), yet it must have a fair and reasonable construction, having regard to the particular purpose it was intended to subserve and the special evils it was designed to remedy. It is to be observed, also, that at the time of its enactment it was the only statute of the United States in force making any provision for the compulsory attendance for examination of witnesses out of Court, to be used upon trials in the Federal Courts. The statute regulating the attendance of witnesses under examination on commission, and providing that the courts of the district in

The United States v. Samuel J. Tilden.

which they might be examined should compel their attendance, and the production by them in proper cases of books and papers, (now Rev. Stat. §§ 868-870), was not passed till 1827, nearly forty years later. And although this statute of 1789 declares that "nothing herein shall be considered to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice," yet I think it cannot be claimed that this *proviso* effectually supplied, or was understood by Congress to supply, the defect in the statute for *de bene esse* examinations of witnesses beyond a hundred miles from the place of trial, and as furnishing other effectual means of compelling the production of material books and papers by such distant witnesses, since it was not till long afterwards that any statute was passed giving to the courts the power to compel such production of books and papers in case of witnesses examined under commission. There was one large class of causes, that might arise under laws relating to patents, contemplated from the beginning as liable to be pending in the Federal Courts, although no patent law had then been passed, to which this reasoning applies with special force. In another large and important class of Federal causes, Admiralty suits, which were clearly within the view of the framers of this law at the time of its enactment, this construction of the Act is peculiarly necessary, since from the occupation of the witnesses they must be tried largely upon depositions. But the urgent necessity for this construction is by no means confined to any particular class of cases. The argument that a *subpœna duces tecum* is not named in the statute, nor the matter of the production of books and papers, is, I think, sufficiently met by saying that such mention was wholly unnecessary. The provision

The United States v. Samuel J. Tilden.

for compelling obedience on the part of the witness was in these words: "Any person may be compelled to appear and depose as aforesaid, *in the same manner as to appear and testify in court.*" It was for a long time considered doubtful whether this power of compulsion was conferred upon the magistrate who was empowered to take the examination or upon the court of the district in which the examination is taken. The latter view has prevailed. (*In re Humphrey*, 2 Blatch. C. C. 228; *In re Peck*, 3 Blatch. C. C. 113; *Ex parte Judson*, 3 Blatch. C. C. 89.) The words "may be compelled in the same manner as to appear and testify in court," refer to the instrumentalities then in force in the common practice of the courts for compelling the attendance and the testimony of witnesses, the writ of *subpœna* and the power to punish disobedience to a lawful order as a contempt. This is the practical construction which these words have received. (Cases last cited.) The writ of *subpœna duces tecum* was, equally with the *subpœna ad testificandum*, and in certain cases the writ of *habeas corpus ad testificandum*, such an instrumentality in common use. The failure to mention it or to define the instrumentalities further than by a general reference, broad enough to include it, constitutes, as it seems to me, no valid argument for its intended exclusion, when the evident purpose of the Act and the construction necessary for its beneficial operation are considered.

The argument, drawn from the comparison between § 863 and the sections of the Revised Statutes regulating the compulsory attendance of witnesses and their production of books and papers upon the examination, would have great weight if they were contemporaneous statutes. If these other provisions had been contained in the Judiciary Act of 1789, it could be argued with great force that this especial provision for producing books and papers in the one case

and the omission of such provision in the other, showed an intention to discriminate between the two cases in this particular. But, as pointed out above, these provisions are enactments of forty years later, when it appears to have been found necessary to supply, in case of examinations under commissions, this very power to compel compliance on the part of the witness with the conceded right of the party to take his testimony. It would seem that the beneficial and convenient exercise of the power to examine witnesses *de bene esse*, under the Act of 1789, had been so generally availed of that it was not till 1827 that Congress was called upon to pass an Act giving like powers in this other class of examinations. The terms in which the power is granted are more in detail than in the old statute, and certainly some valuable safeguards against the abuse of the power are embodied in the statute itself. But it seems to me that this furnishes no reasonable aid in the construction of that part of the earlier law now in question; that is to say, as to what is meant by "*the same manner as to appear and testify in court*," except that the special provision for compelling the production of books and papers when material as evidence in the cause is an essential or important part of the relief intended to be given by such a statute. And it is to be observed, further, that the English Act of I. William IV., Ch. 22, (6 Eng. R. S. p. 849), above referred to and passed in 1831, contained a similar provision to that in the Act of Congress of 1827, for the production upon the examination of books and papers.

I have not overlooked the possible inconveniences and dangers to the private and business interests of witnesses, so strongly urged as a reason for excluding the construction which allows the issue of a *subpœna duces tecum* in such a case. But while the law jealously protects private books and papers from unreasonable searches and seizures, and

The United States v. Samuel J. Tilden.

from unnecessary exposure, even when necessarily produced in court, yet the principle is equally strongly held that parties litigant have the right to have private writings which are competent for proof in their causes produced in evidence; and to this imperative demand of justice, all scruples as to the confidential character of the writings as private property, except in certain well-ascertained exceptions growing out of professional employment, must yield from considerations of public policy. The argument has gone largely upon the terms of this statute, as it now exists, in the Revised Statutes, which extends the power to take these depositions to all notaries public. It must be admitted that this extension increases the possibility of inconvenience and perhaps of positive injury in the operation of the statute; but the question is to be determined upon the Act of 1789, which has not, in the particulars under discussion, been materially changed, and which conferred the power only on a justice or judge of the United States, a chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, all being judicial officers of considerable experience, except mayors of cities, who, at the time the Act was passed, might certainly be presumed to be persons of great intelligence and experience in the conduct of business, and, at that time, very few in number. Congress, in extending the class of examining officers for reasons of public convenience so as to include notaries public, seems not to have appreciated highly the supposed greater dangers to which witnesses might be thereby subjected. And perhaps it was regarded as a sufficient protection against the abuse of this process, that the courts of the United States have full power by general rules, or special orders in the absence of general rules, to check and guard against the

The United States v. Samuel J. Tilden.

abuse of the processes of the court. Thus, if this power of subpoenaing witnesses to produce books and papers were found to be used oppressively upon witnesses, it would seem to be competent for the courts to prevent it by requiring by their rules a compliance with reasonable conditions as to the preliminary proof of the necessity for the production of the books and papers and of their materiality as evidence in the cause.

2. The claim made on behalf of the witness that no *subpœna duces tecum* can issue except under the provisions governing the practice in the N. Y. Code of Civil Procedure, seems to rest wholly on Rev. Stat. § 914, assimilating the practice of the courts of the United States, in civil causes other than cases of equity and admiralty, to the practice in the State courts. This section has been held not applicable to matters specially regulated by Act of Congress, as this matter of depositions *de bene esse* appears to be. (*Beardsley v. Littell*, 14 Blatch. 102.)

3. Finally, it is objected that no *subpœna duces tecum* will issue merely to compel the production of books and papers to be used on the examination to refresh the recollection of a witness. Books and papers are, as matter of practice, constantly used in court upon the examination of witnesses for the purpose of refreshing their memory. In some cases, it may well be that this opportunity to refresh the memory of a witness called in a cause may be of great value to a party. But it certainly is a startling and I believe a novel proposition, that a merchant or broker or banker may be subpoenaed to produce all his books of account and all his business papers during a period of ten years, as was substantially attempted in this case, upon a mere possibility that out of this mass of books and papers some might be found whereby he could refresh his memory,

The United States v. Samuel J. Tilden.

if it should, upon his examination, appear that his memory needed refreshing on some point on which he should prove to be able to give testimony competent in the cause. No precedent is produced for this exercise of power, nor has any statute or decision been found or cited which appears to recognize or authorize the compulsory production of books and papers for such a purpose, the same not being relevant or material to the cause. While there is a possibility of failure of justice in special cases from an inability to resort to this means of refreshing the memory of a witness, it seems to me clear, that this evil is not of so substantial importance as to require a construction of this statute so extremely liberal in favor of parties litigant and so inconvenient and oppressive to witnesses and so beyond all precedent in the practice of examining witnesses out of court. It has been well pointed out that in such examinations, on account of the limited power of the examining magistrate, persons summoned for such examination have less chance of protection against the oppressive and injurious use of this power of the court than upon a trial in court where all questions arising can be submitted to and decided by the court as they arise. And I am satisfied that the statute in question does not require a construction permitting such a compulsory production of a witness's books and papers. A very strong if not a controlling argument in support of this view, is to be drawn from the terms of the statute of 1827, above referred to. In providing for the regulation of this very matter in examinations under a commission or *ad litem potestatem*, it expressly limits the compulsory production of books and papers to such only as would be "if produced, competent and material evidence for the party applying therefor." This is a legislative declaration of the highest possible character, as it seems to me, that this was as far as the policy of the law goes in the

The United States v. Samuel J. Tilden.

matter of compelling the production of books and papers on the examination of witnesses out of court, and all that substantial justice requires in this direction, having a due regard to the rights, the convenience and the interests of other persons as well as of the parties litigant. No reason can well be imagined for supposing that Congress would withhold from this class of examinations under commission, where the commissioners are appointed by the court and the mode of interrogation is prescribed before the examination under the direction of the court itself, as full an authority to compel the production of books and papers by the witness as is allowed on an examination *de bene esse*, which is subject to less restriction and supervision. This Act, therefore, seems to show that Congress understood that this was the limit allowed for the compulsory production of books and papers under the system of examinations *de bene esse* then in force.

The circumstance that in supposable cases there may be even a serious failure of justice by reason of the inability of a court to exercise a certain power, is not in itself the test of the existence of that power. The question always is, Does the statute, fairly construed, having in view its purpose and its effect, authorize the exercise of the power? Our machinery for administering justice is not and must not be expected to be found absolutely perfect in its operation. There are cases of hardship and possible injustice, not provided for; and whether or not they can be properly provided for with a due regard to all other public and private interests entitled to be considered in connection with any proposed alteration of the law, is, of course, exclusively a question for the legislature and not for the courts.

It must be held, in this case, that there was no authority to compel the production of the witness's books and papers

Endicott et al. v. Renauld et al.

merely to refresh his memory, and for this reason his refusal to produce them is sustained.

For the United States, *S. L. Woodford*, District Attorney, and *S. B. Clarke*, Asst. District Attorney.

For the witness, *Win. Allen Butler*.

OCTOBER, 1879.

CHARLES G. ENDICOTT ET AL. VS. PETER A. G.
RENAULD ET AL.

BILL OF LADING.—DAMAGE TO CARGO.—DUNNAGING THE CENTRE-BOARD-WELL.—TENDER.

The owners of a vessel filed a libel to recover freight on a quantity of sugar brought by her from Havana to New York. The consignees set up as a defence damage to the sugar on the voyage, and that there was only the sum of \$200.32 due for freight, which they had tendered to the libellants. It appeared that they had offered to pay that sum in full discharge of the claim for freight. The sugar was partly in bags and boxes and partly in bulkheads. The damage to the sugar was caused by sea water, and it was in the sugar that was stowed near the centre-board-well. There was a contest on the evidence whether there was any dunnage by the well. The master of the vessel thought the damage was caused by sweat and had refused to make a declaration for the consignees that it was caused by sea water.

It is held that there was damage by the centre-board-well, but that it was not sufficient to prevent the cargo near it from damage by the ordinary and usual leakage in that part of the vessel; that there was no proof of such weather as to cause the leakage of the sea, and that however difficult it might be to prevent cargo near the centre-board-well from damage by such ordinary and usual leakage in the well, that was a duty which devolved on the ship;

Endicott, *et al.*, v. Renauld *et al.*

That the damages sustained by the sugar must therefore be deducted from the amount of freight;
That the tender was insufficient.

CHOATE, J. This is a libel *in personam* by the owners of the schooner Susan B. Ray against the consignees of the cargo to recover a balance of freight moneys alleged to be due upon the delivery of the cargo in New York. The cargo consisted of 236 hogsheads, 488 boxes and 2510 bags of sugar. It was shipped in Havana under bills of lading by which it was to be delivered "in the like good order and condition" as when shipped, "the dangers and accidents of the seas and navigation of whatever nature or kind excepted." The libel alleges that the sugars were "duly delivered in like order in which they were received, the dangers and accidents of the seas only excepted." The answer avers "that the sugars were delivered reduced in quantity and in a damaged condition; that the loss and damage were not caused by perils of the sea" but by the "carelessness, unskillfulness and wrongful acts of the master, officers and seamen of the vessel" and "by defective dunnage, stowage and improper handling and want of care of the sugars" on the voyage. The loss thus attributed to the fault of the vessel is stated in the answer to be \$640.68. The whole amount of the freight is admitted to be \$1827, and the amount already paid to be \$900. The answer further avers that defendants are "willing to pay in discharge of their liability for the freight, the further sum of \$286.32," which sum they "have hitherto tendered" to the libellants. On the trial it was admitted that the respondents offered to the libellants this sum of \$286.32, if accepted in full discharge of libellants' claim, and that libellants refused to accept it on that condition. There was no other proof of a tender.

Endicott, et al., v. Renauld et al.

It appeared by the proofs, that when the cargo was discharged, there were found to be one hundred and ninety-three bags damaged; of these twelve were empty, or nearly so, and the rest more or less reduced in quantity or wet with salt water. There were also twelve boxes damaged, one being empty and others partly empty. There was really no doubt upon the evidence, that the injury was caused by sea water. The vessel had two decks and the sugar that was damaged was stowed in the lower hold. The hogsheads were stowed at the bottom. On top of the hogsheads were the bags and boxes. The hogsheads were not damaged.

The vessel had a centre-board, and the damaged bags and boxes were found adjoining to or near the trunk of this centre-board, which rose about nine feet high in the hold.

The question to be determined is whether the damage was caused by a peril of the sea or by insufficient dunnage.

The vessel arrived in July, 1877. The master and the second mate and one of the seamen of the vessel were examined before the trial in April, 1878. The testimony of the master was to the effect that there were eleven inches of dunnage at the bottom by the keelson, and that it extended up to the bilges, but not so deep; that the dunnage consisted of pine wood and boards; that there was dunnage along each side of the centre-board trunk, pine wood standing up and down and boards against the wood running fore and aft; that this dunnage was kept in place by the pressure of the cargo against it. The master also testifies that a part of the passage was very rough and the rest good weather; that the vessel did not leak more than usual; that the pumps were tried every two hours; that during the rough weather there was a great deal of steam from the sugar, making it very hot in the cabin; that he saw no signs of water in the vessel from leak; that he and the second mate superintended the dis-

Endicott, *et al.*, v. Renauld *et al.*

charge of the cargo; that he thought then, and still thought, at the time of the discharge, that the damage was caused by sweat. The second mate testified to the same effect as to the dunnage; also that they had "a middling rough passage home sometimes, and sometimes pleasant weather;" that she leaked no more than usual; that the pumps were attended to every two hours; that the hatches were well secured, caulked tight, soaked and tarred; that they showed no appearances of a leak in or around them; that the deck was tight and showed no indication of leak; that she hardly ever leaked enough for the pumps to catch it. One of the crew also testified that he helped stow the cargo; that there were some boards used as dunnage; that the boards were placed on the wood along the well of the vessel; that they had a rough passage occasionally; that the vessel did not leak any to speak of; that she leaked some; that the pumps were tried every hour; that they did not show that she leaked much; that she leaked "no more than common;" that there was dunnage between the centre-board trunk and the cargo, consisting of pine wood and boards; that the wood was Virginia pine wood about four feet long.

Upon the trial the stevedore who discharged the cargo testified that there was dunnage along the sides of the centre-board trunk and in front of it from the bottom to the top, consisting of wood up and down and boards across the wood; that this dunnage was from eight to ten inches thick. He also testified that he found, when they came to break down the cargo by the forward part of the centre-board trunk, that the oakum had started and that there were indications of a leak. The cooper employed by the vessel in New York also testified that there was dunnage against the centre-board trunk, consisting of wood and boards. He could give no positive testimony as to its thickness.

Endicott, *et al.*, v. Renauld *et al.*

The claimants called two witnesses, the cooper employed by the consignees of the cargo and his journeyman, who testified, positively, that there was no dunnage against the centre-board trunk; that there was nothing between this trunk and the cargo. I think, however, that the weight of evidence is decidedly with the libellants on this point, and that these two witnesses are mistaken. But the question still remains whether that dunnage was sufficient. That there was dunnage there, consisting of wood up and down, with boards across the wood, may be assumed as a fact proved. Its thickness is not proved. In judging of its sufficiency, it is necessary to consider, not only what is the proof as to the dunnage being there, but, also, how far it protected the cargo, and whether the cargo was in fact exposed to any peril of the sea which will account for the injury to the cargo. For, if it was exposed to no such peril, then, from the fact that the cargo was wet, it might be inferred that the dunnage was insufficient.

In the present case there is not sufficient evidence that there was any peril of the sea. It is true there was some leakage around this centre-board trunk, but it is obvious that it was very trifling. The very fact that it was thought necessary to have dunnage there at all, shows that it is regarded as possible that some water may get in to the vessel at this place. But the evidence of the master, second mate and seaman, is explicit that there was no more leak than usual upon this voyage; that in fact the vessel was remarkably tight and free from leak. There was no leak of any account, as shown by the pumps. A ship must be dunnaged so as to protect the cargo even in rough weather, if the vessel springs no serious leak. And if the construction of a vessel with a centre-board is such that the cargo lying next to it is liable to be damaged in rough weather by water oozing in

through the seams of the centre-board, but without springing any serious leak, the dunnage against and around the centre-board trunk must be sufficient to protect it, if it has to be dunnaged two feet deep. As the ship rolls, undoubtedly the water so oozing in is liable to be thrown off from the trunk one way and the other. But the vessel must be prepared for rolling in rough weather, and in this case the weather was not exceptionally bad. I think it clear that the dunnage was insufficient to protect the cargo against ordinary leakage at this point and such as should be expected in almost any ocean voyage, and that there was no other leakage. This part of the cargo may be very difficult to protect against even a slight leak, but this is not the fault of the shipper. It may be the misfortune of the ship in having this peculiar construction, and this is a danger against which the ship has undertaken to guard the cargo.

That there was no serious or unusual leak is, I think, shown, not only by its description so far as testified to by the witnesses, but also by the conduct of the master, who, when he claimed the balance of his freight, declined to make a declaration that the damage was caused by sea water. He thought then that the damage was caused by sweat, a theory which has been entirely disproved. The sugar was shown to be dry centrifugal sugar. The libel sworn to by the master merely states that the sugars "were delivered in like good order, the dangers and accidents of the seas only excepted." Whether they were delivered without damage, or being damaged, that damage was caused by sea peril, was left wholly uncertain on the libel; it left the libellants at liberty to prove either of these two states of the case. The transaction between the master and the agent of the consignees, as testified to by the master himself, shows that he was unwilling to take the ground that they were injured by sea

The Yacht Clytie.

peril. And in his testimony he did not take this ground. Springing a leak in rough weather may be a peril of the sea which will exonerate the ship, but it must be a leak more serious than what is here described as the usual or common leak and as one which the pumps would hardly reach.

Therefore there must be a decree giving the respondents their damages, to be deducted from the balance of freight due.

The tender made is insufficient under Rule 72 of this court, because not made good by depositing the amount in court, if it was any tender at all. The question of costs, however, is reserved till the respondents' damages have been assessed.

Decree accordingly.

For libellants, *R. D. Benedict*.

For respondents, *H. E. Davies* and *I. Phillips*.

Eastern District of New York.

OCTOBER, 1879.

THE YACHT CLYTIE.

Case No. 10,000. — NARRATIVE — OVERTAKING VESSEL — RULES OF NAVIGATION — DISTANCE BETWEEN DISTINGUISHABLE MEASURES — TESTIMONY OF

Witnesses: The Yacht Clytie, and the Yacht ... of a squadron, beating out of New Bedford ... S S E. weather clear and all vessels in plain sight, being ... a hundred and forty feet apart

The Yacht Clytie.

and approaching a long tow crossing their then courses, went about so near together that the jib-boom of the one astern as she forged ahead caught the outer leach of the main-sail of the other then crossing her bows and just filling away on the other tack, and some slight damage was done, for which suit is brought:

Held, That the C. was the overtaking vessel under Rule 22 (Revised Statutes Sect. 4233, Art. 17), but nevertheless it was the duty of the V., under the circumstances, to terminate her port tack in time to enable the C. to tack between the tow and herself, whether or not she was hailed so to do;

That the C. was justified in holding her reach, relying upon the V.'s shortening her tack if necessary, provided that she herself went as near the tow before tacking as was prudent for her to go;

That upon the evidence the C. might have gone much nearer the tow in safety, and as only six feet nearer was required to have enabled the yachts to pass each other clear, she must be held responsible for the collision and damage, and the V., having left her room enough, must be held not in fault;

That when of two doubtful measures to be decided on to avoid a collision, the one taken carries the vessel so nearly clear as six feet, it cannot be imputed to her as a fault that she did not take the other course. What a yacht is willing to do for the sake of winning a wager, she is, in a case of necessity, bound to do to avoid a collision.

Semble, That even where a case is governed by statutory sailing rules, the question being whether the circumstances are special and render a departure from the rule necessary, the testimony of practical seamen as experts may be taken.

BENEDICT, J. This is an action involving an insignificant sum of money, which has been brought, as I must suppose, for the purpose of obtaining a judicial determination of certain nautical questions, both of law and of fact, that have come to be matters of dispute between the parties thereto. The earnestness displayed by the respective advocates, and the amount of time they have felt justified in consuming in the presentation of the case, indicate that, by the parties at least, these questions are deemed of importance.

The incident that gave rise to the controversy was the tearing of the mainsail of the yacht *Volante* by the yacht

The Yacht Clytie.

Clytie, while the two, together with the rest of the New York yacht squadron, consisting of some twenty vessels, were beating out of the harbor of New Bedford, on the 15th day of August, 1877.

The parties to the controversy are, on the one side, Francis B. Hitchcock and Thomas Hitchcock, who, as owners of the yacht *Volante*, have filed their libel against the yacht *Clytie*, to recover the damages by them sustained by reason of the tearing of their sail; on the other side, William L. Brooks, who, as claimant of the yacht *Clytie*, appears in her defence. The facts attending the collision have been narrated to the court by some thirteen witnesses who saw the occurrence, and in addition expert testimony from several witnesses has been presented.

The vessels involved are described as follows:

The *Volante* is a sloop, English cutter rigged, forty-five feet long with twenty feet of bowsprit out-board, making sixty-five feet in all. The *Clytie* is a schooner, eighty-five feet long, one hundred and thirty-five feet from the end of the main-boom to the end of the flying jib.

The account of the accident given by the parties in their pleadings, first deserves attention. According to the statement in the libel, the *Volante* was standing out of New Bedford harbor, close hauled upon the starboard tack, and near the middle of the channel, standing to the eastward at the speed of about three knots an hour, the wind being from the southward and eastward. While the *Volante* was in the situation aforesaid, the *Clytie*, on her way out of said harbor, was standing to the southward or southward and westward, and had been, for not less than half an hour, visible from the *Volante's* deck. The *Clytie* was to leeward of the *Volante* and bearing to the northward and westward, and was close

The Yacht Clytie.

hailed on the port tack, sailing as fast or faster than the Volante, and was heading so that she would strike the Volante on the Volante's quarter, or else would pass astern of the Volante. Thereupon, when so to leeward of the Volante and close aboard, the Clytie went in stays, and while in stays ran into the Volante on her port side near the quarter, while the Volante was in the position above described; and the libel charges that the Clytie should either have kept off so that she would go well astern of the Volante, or else have gone in stays sooner so as to allow for head-reaching while in stays.

It will be observed that the case stated in the libel is that of two vessels under sail, close hauled, having the wind on different sides, and crossing so as to involve risk of collision. That is to say, the libel states a case where it was the duty of the Clytie, having the wind on her port side, to keep out of the way of the Volante. A violation of sailing rule 17 (article 12), is therefore the fault charged upon the Clytie in the libel.

The Clytie in her answer denies the correctness of the account given in the libel, and gives an account of the accident in substance as follows: The Volante and Clytie were beating out of the harbor of New Bedford, the wind being about southeast and a fair working breeze. The channel at the place of collision was only about an eighth of a mile wide, and this distance, so far as the working room of the two yachts was concerned, was diminished by half, owing to a tug which was standing out of the harbor in the middle of said channel having two large yachts in tow, one astern of the other with a long hawser between them, and heading about south. The Volante was on the port tack, close hauled, and heading so that she would strike the tow unless her course was changed. The Clytie was on the same tack,

The Yacht Clytie.

close hauled, and a little to leeward and astern of the Volante, and heading so that she also would have to change her course before reaching the middle of the channel in order to avoid striking the said tow. Several other yachts were to leeward of the Clytie on the same tack, one of them being so close under her lee that the Clytie could not keep off without coming in contact with her. The Clytie was going faster than the Volante and was so close aboard of her that she could not luff up or go about without running into the Volante. The Volante kept her course unchanged until very near to the said tow, when she went about and filled away on the starboard tack. At the moment the Volante so went about the Clytie was still to leeward of her and had nearly caught up with her, and it was absolutely necessary for the Clytie then to go about to avoid running into the tow which was close aboard of her, and accordingly she went in stays; but being a much larger vessel than the Volante, it took her much longer to get around, so that while she was still in stays the Volante had got around on the starboard tack and was heading directly across her bow. Those on board the Clytie, seeing that there was no room for her to get around on the starboard tack without certainly running into the Volante, kept her in stays, so that the Volante, by luffing up a little, might allow the Clytie to pass astern of her; but the Volante, instead of luffing up, kept her course with sails full, and came straight across the Clytie's bow, so close that just as she was going past, the head boom of the Clytie caught in the Volante's mainsail, forward of the leach rope, and brought her up all standing. The answer expressly admits that at the time of the collision the Clytie was going fast enough to steer well and charges the accident to have been caused by the fault of the Volante in not going about on the starboard

The Yacht Clytie.

tack sooner than she did, and in not luffing up after she had got about on the starboard tack, so as to allow the Clytie to pass astern of her.

The case stated in the answer is obviously one to which sailing rule 17 (art. 12) has no application, but is that of one vessel, close hauled, overtaking another vessel close hauled upon the same tack and to windward, under circumstances rendering it impossible for the overtaking vessel to avoid colliding with the leading vessel while tacking, because of a failure on the part of the leading vessel to give the following vessel room to make her tack. According to the answer, therefore, the case is one to which sailing rule 24 (art. 13) applies, where, by reason of special circumstances, the general rule applicable to overtaking vessels is not to be applied, and the leading vessel is to be charged with fault for failing to make proper effort to prevent a collision otherwise unavoidable. The special circumstances are the narrow distance in which the yachts were compelled to work; the presence of the tow directly in the course of both yachts; the relative speed of the yachts and their position with reference to each other. It is thus seen that the pleadings of the respective parties state cases wholly dissimilar.

If this case were one in which to enforce the rule of the admiralty whereby the decree is required to be according to the averment in the pleadings as well as according to the proofs, and the enquiry was therefore limited to whether the collision occurred as stated in the libel, a short disposition could be made of it; for, although Mr. Hitchcock's statement upon the stand, in harmony with his account in the libel, is that the Clytie was upon the port tack at the time of the collision, the evidence of the other persons present does not permit it to be contended that the Clytie was upon the port tack at any time after the *Volante* had gathered way upon

The Yacht Clytie.

the starboard tack. But I have not been asked to dismiss this libel upon a question of pleading, and as the answer sets forth an affirmative case, in regard to which evidence has been given and argument made on both sides, I can properly consider the points thus submitted for decision. (*The Clement*, 2 Curt. C. C. 365.) It will aid to an understanding of these points to state here such facts as I find to be either admitted or proved beyond dispute. The collision occurred in broad daylight. The wind at the time was blowing a fresh breeze from the south-southeast. The weather was clear and the vessels were in plain sight of each other for a considerable period before they came in collision. As stated in the libel, the collision occurred near the middle of the channel, which was at that place obstructed by the tow described in the answer, then passing to the southward, somewhat to westward of the middle of the channel, and, so far as these two yachts was concerned, having the effect to narrow the channel by nearly one-half. The tide was flood. The *Volante* and the *Clytie* got under weigh with the rest of the squadron at the signal given. Their first tack was to the eastern shore, heading about for red buoy No. 16, on the eastern side of the channel, opposite Palmer's Island. On this tack the *Volante* came abeam of the *Clytie* while the latter was getting away from her anchorage, and was to the windward as the yachts approached buoy 16. The *Clytie* was the larger and faster vessel of the two, and as they rounded the buoy, hailed the *Volante* to go about. The hail was heard on board the *Volante* but disregarded, and the *Clytie* to avoid the *Volante*, passed inshore of the buoy. When she was coming about she caught her centre-board on the *Volante*'s stern for a moment and fell off some four feet.

The Yacht Clytie.

Before coming to her course by the wind on the port tack, she passed some distance to the eastward from the buoy. When she did come by the wind the Volante was to windward of her and ahead, the courses of the vessels upon the port tack being about parallel and some one hundred and forty feet apart, as stated by Mr. Brooks. The tow was in front of both yachts upon that tack, and it was apparent to both that a tack must be made by both vessels to eastward of the tow. As they drew near the tow the Volante first put her helm down and tacked quickly without losing her headway in any substantial degree. The helm of the Clytie was put hard down immediately after the Volante was seen to be tacking. As the Clytie came head to wind she forged ahead, and while head to wind, and as the answer expressly admits—therein contradicting the evidence of her sailing master—while “going fast enough to steer well,” her jib boom caught in the outer leach of the mainsail of the Volante, then crossing her bows upon the starboard tack with sails all full. Had the Clytie been six feet further to the westward there would have been no collision. Twenty-five feet was a safe distance from the tow for the Clytie to be when head to wind. How far from the tow the Clytie was, in fact, when she came head to wind is a question over which the contest has been severe. The distance astern of the Volante at which the Clytie was when she came by the wind upon the port tack, is equally a matter in dispute.

Upon these indisputable facts it has been contended in behalf of the Clytie that inasmuch as the Volante started from her anchorage further up in the harbor and astern of the Clytie, the Volante was the overtaking vessel at the time of the collision and charged with the duty of avoiding the Clytie. But I cannot agree to this view. On the contrary, I am of the opinion that from the time when the

The Yacht Clytie.

Clytie was stopped near buoy 16, at which time the Volante was standing over to westward towards the tow, on her port tack, the Clytie was the overtaking vessel.

I next notice the contention of the Volante that the Clytie is responsible, because, being the overtaking vessel, she came in collision with the Volante in violation of sailing rule 22 (art. 17), which provides that "every vessel overtaking any other vessel, shall keep out of the way of the last mentioned vessel."

The responsibility of the Clytie does not necessarily follow from the mere fact that she was overtaking the Volante on the port tack. For sailing rule 22 (art. 17), like all the other statutory sailing rules, is subject to sailing rule 24 (art. 19), which provides that "in construing and obeying these rules due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case; rendering a departure from them necessary in order to avoid immediate danger." Accordingly it is contended on the part of the Clytie that in this instance the relative speed of the two yachts and their position with reference to each other and to the tow ahead, were circumstances that required the Volante to shorten her course upon the port tack sufficiently to enable the Clytie, on reaching the tow, to come to the wind between the Volante and the tow, and so pass to windward; and it is claimed in behalf of the Clytie that the sole cause of the collision was the fault of the Volante in continuing her port tack so near to the tow as to render it impossible for the Clytie to avoid collision at the tow.

From the evidence there is no room to doubt that, however the wind may have been at the time when the Clytie came on the wind on the port tack, there was a time after the wind was on the wind when the Clytie had gained

The Yacht Clytie.

upon the Volante to such a degree that it was impossible for her either to luff clear of the Volante or to go upon the starboard tack under the Volante's stern, or to clear the tow by bearing away, or to slacken her speed, or to anchor; and that after that point had been reached by the Clytie it was still possible for the Volante, by shortening her port tack, to enable the Clytie to tack at the tow without hitting either the tow or the Volante, and so avoid collision. From that time forward the right of the Volante to keep her course without reference to the Clytie was at an end, and it became her duty to terminate her port tack in time to enable the Clytie to come to the wind in safety between the tow and the Volante. This obligation rests upon principle, for under the circumstances stated, if the Volante should fail to shorten her tack, it would not be possible for the Clytie to avoid striking the Volante except by running into the tow, while it would be entirely possible for the Volante to shorten her tack without any substantial loss of distance or increase of risk, and thereby to prevent a collision. The decisions are uniform that no vessel can properly insist upon adhering to a right given by any sailing rule when a collision will be caused by such adherence. This understanding of the duty of the Volante under the circumstances stated, derives support from the evidence given by experts as to the practice of seamen under similar circumstances. It has been said here that expert testimony is incompetent in a case governed by statutory sailing rules. But where the question is whether the circumstances are special, and render a departure from the general rule necessary to avoid immediate danger, it appears to me to be both reasonable and proper to consider the effect given to similar circumstances by practical seamen in actual navigation. It is the testimony of all the experts that under circumstances similar to those stated it is the practice

The Yacht Clytie.

among seamen for the windward vessel to shorten her tack with reference to the necessities of the vessel to leeward; but some intelligent seamen, differing from others equally intelligent, say that in practice, the windward vessel never goes about for the vessel astern, unless she is hailed to go about by that vessel. Manifestly, on this occasion, it was not supposed by those on board the Volante that a hail from the Clytie was necessary to render it obligatory on them to shorten their tack, for Mr. Center, a yachtsman of large experience, who was on board the Volante and part of the time at her helm, and who is called as a witness by the libellant, and who says that he heard no hail from the Clytie (as say all the others on board), when particularly interrogated in regard to the Volante's movements, gives the following testimony:

Q. What was your object in going about as you did?

A. To give the other boat plenty of time; I saw the Clytie coming behind us, and in order to give him time.

Q. You thought you had to do that?

A. Always have to do it.

But whether a hail from the Clytie was or was not necessary in order to cast upon the Volante the duty to shorten her tack, is a question of no importance in this instance, because there is convincing evidence that the Volante while on the port tack was loudly hailed and beckoned to go about. It is true that no one of those on board the Volante who have been called as witnesses, heard the hail or saw the signal from the Clytie, but this negative evidence is by no means sufficient to overthrow the positive and particular testimony of the seamen on the Clytie who gave the hail and of the sailing master who ordered the hail to be given, and the witnesses on the Clytie who heard the hail given. The evidence for the Volante, in regard to

The Yacht Clytie.

not hearing the hail, can do no more than convict those on board of a want of proper attention. The Clytie was known to be coming behind them to leeward and on the same tack, that she was the faster vessel and that both were approaching an obstacle that would compel both to tack. If it be the practice under similar circumstances for the leeward vessel to hail, there was every reason for those on board the Volante to anticipate a hail from the Clytie which would require the Volante to go about, and it was the duty of those on board the Volante to be watching for the signal. Had they been watchful, there is no room upon the evidence to doubt that they would have heard the hail that was given or seen the signal that was made. The legal obligation of the Volante to shorten her tack is therefore the same as it would have been had she heard the hail.

The next question is, did the Volante so tack as to permit the Clytie to come to the wind between the tow and the Volante without hitting either?

That it was the duty of the Clytie under the circumstances to hold on to her port tack as long as was possible without running into the tow is conceded by her; failure on her part to perform this duty must render her liable. On the other hand, if there was no such failure on the part of the Clytie, the fact that the vessels collided in the manner they did, convicts the Volante of a failure sufficiently to shorten her tack, and casts upon her alone the responsibility for the accident. It is thus seen that the vital question of the case is one of fact—a question of distance—namely, the distance from the tow at which the Clytie was when she came head to wind.

Before passing to the consideration of the question of this distance I turn back to notice the point made in behalf of the Volante, that whatever failure of duty there may have

The Yacht Clytie.

been in the part of the Volante after the Clytie had approached so near as to render it impossible for her to luff clear of the Volante's stern, the Clytie was guilty of fault for not tacking under the Volante's stern as soon as she had come by the wind, at which time, as it is contended, it was possible for her so to do, or for not slackening her speed to avoid collision at that time, and so to avoid being afterwards placed in a position where she would be forced to run into the Volante or the tow unless the Volante afforded a way of escape by shortening her tack.

Here too the parties differ upon a question of fact. On the part of the claimant it is insisted that there was no time after the Clytie came to the wind when she was not too near the Volante to permit of her passing under the Volante's stern. But the weight of the evidence upon this question seems to be in favor of the Volante. Indeed, if at the time the Clytie had tacked, she caught the Volante's mainsail and boom, she being then head to the wind and the Volante being then tacked and filled away to the eastward, it is asserted that if at an earlier period, when she was past the Volante, and when the Volante was still on the port tack, the Clytie had tacked, she would have cleared the Volante entirely. Such being the case, if the Clytie had been a steamboat, able to stop at command, and the vessels had been in the open sea, it would be reasonable to say that the Clytie was not in fault for not tacking and avoiding getting into a position of danger under the Volante's stern. But, considering that the Clytie was not under the wind until some distance over from the Volante, and in view of the importance of keeping her stern clear when the working room was so narrow and the vessels were approaching from behind—there being no room to go beyond Palmer's Island, and, accord-

The Yacht Clytie.

ing to Mr. Center, having only from four hundred to five hundred feet of working room—I am inclined to believe that the Clytie was justified in holding her reach, relying upon the Volante's shortening her tack when she approached the tow, in case the Clytie should then have approached so near as to render action on the part of the Volante necessary to avoid collision.

In reaching this conclusion, based as it is upon the peculiar situation of these vessels, I do not, as I conceive, trench upon the established rule applicable to the overtaking vessel under ordinary circumstances, nor do I go contrary to any adjudged case that I have been able to discover after careful search in the reports, not omitting the cases of *The Nellie D.* (5 Blatch., 245); *The Charlotte Raab*, (Brown's Ad. R., p. 453); *Whitteredge vs. Dill*, (23 How., p. 453); *The Priscilla*, (1 Asp. M. L. C., 469).

Manifestly the Clytie could not have borne away as soon as she had come by the wind without danger of becoming involved with some of the nineteen yachts that were beating out behind her, and surely she was not bound to heave to or anchor in mid-channel under such circumstances. That those on board the Volante did not at the time expect the Clytie under the circumstances to abandon her tack, but anticipated that she would hold on and rely upon having room left her by the Volante in which to come to the wind upon reaching the tow, is, moreover, quite evident.

I am thus again brought to the vital question of the case, namely, as to the distance at which the Clytie was from the tow at the time when she was in stays head to wind. The evidence bearing upon this question consists of estimates of the distance given by witnesses upon the stand, some of whom were on board the Volante, some on the Clytie, some on the tow, and some on other yachts in the

The Yacht Clytie.

squadron. Besides these estimates there are various facts proved in regard to position, bearing, speed and movements of the respective yachts which serve to show this distance. The testimony of Mr. Center goes to show that the Clytie came head to wind when over two hundred feet distant from the tow. Dayton, who was on board the yacht Rambler, in the tow, puts the Clytie one hundred and forty feet from the tow when head to wind. Thomas, who was also on the Rambler, makes the distance sixty feet. Mr. Brooks, the claimant, gives the distance at twenty-five or thirty feet. Belmont, the sailing-master of the Clytie, says twenty-five feet. Lyons and Adams, who were on board the Clytie, say forty feet, and Jones says thirty feet. In this variety of estimates it is forcibly argued in behalf of the Clytie that the judgment of the competent men who were on board the Clytie and charged with the duty of determining when it was necessary to come into the wind, is more reliable than estimates made after this lapse of time, and affords a sure foundation for the judgment of the court. But while the presumption certainly is in favor of the correctness of the judgment formed on board the Clytie in regard to the time when it was necessary to put their helm down, there are in the case facts proved by these same persons which show the judgment thus formed to have been erroneous, and that the Clytie did not stand as near to the tow as she could have done with safety. It has already been stated that the Clytie could go within twenty-five feet of the tow without danger. This fact is not open to be disputed by the claimant, for the sailing-master of the Clytie fixes that as the distance at which she was in fact, and Mr. Brooks himself believed that she would come head to wind within twenty-five or thirty feet of the tow. It is also in proof that the Volante put her helm over before the Clytie did and tacked very quickly

The Yacht Clytie.

without losing her headway. The Clytie took some time—fifty seconds, according to the best estimate Mr. Brooks can give—to come head to wind, and then she forereached a considerable distance on a line parallel with the tow. While the Clytie was thus moving parallel with the tow, Mr. Brooks says he noticed the Volante to be on a course across the line of the Clytie's direction, about fifty feet away from the Clytie and coming with a heavy full, giving her a speed of three knots or more. This position of the Volante, after she had tacked, on the starboard bow of the Clytie, shows clearly that the Clytie came head to wind much more than twenty-five feet from the tow. Again, several of the claimant's witnesses show that the Volante made her tack and gathered headway between the tow and the line of the Clytie's direction as she was head to wind, and the Volante was sixty-five feet long including boom. Mr. Brooks also says, "if the Volante had kept on a little further and then gone about she would have been safe." The distance between the Clytie when head to wind and the tow was therefore more than sufficient for a vessel sixty-five feet long to tack and gather headway. This shows the distance to have been greater than is estimated by the claimant's witnesses.

Again, the sailing master of the Clytie says that the Volante should have luffed when she bore four points on the Clytie's starboard bow; at another place that she could have luffed when she was two or three points on the Clytie's starboard bow; and at another place, that the Volante ought to have luffed when she had gone about two lengths on her starboard tack. This testimony, by the claimant's sailing master, shows the distance in question to have been greater than the claimant supposes.

So also Mr. Brooks says, that if the Volante, when she was two or three points on the Clytie's starboard bow, had

The Yacht Clytie.

luffed, there would have been no collision. If there was room for the Volante, being between the Clytie and the tow, and about fifty feet ahead, to bear two or three points on the Clytie's starboard bow and there luff, clearly the distance between the Clytie and the tow was more than one hundred feet.

In addition to these facts, proved by the claimant's own witnesses, there is the fact stated by the mate of the Active, a yacht to the leeward of the Clytie, that his yacht on her port tack passed the Clytie's stern when the Clytie was head to the wind, and went several lengths further to westward, and then tacked in the wake or rather to eastward of the wake of the last boat of the tow.

It is true that this same witness says that the Clytie went close to the tow and near as he would dare to go, but his opinion is overthrown by his act, for he went with his own boat at the least one hundred and fifty feet nearer the line of the tow than the Clytie did. The Clytie having the ability, as she herself shows, to come to wind within twenty-five feet of the tow, and the position requiring that she should be only some six feet nearer the tow than she was, to enable her to clear the Volante, the facts above mentioned plainly show that the Clytie had room to tack at the tow without coming in contact with either the Volante or the tow. This conclusion is decisive of the controversy, for it follows that the Volante having by accident or design—and it matters not which—left room for the Clytie to come to the wind without hitting either the Volante or the tow, was guilty of no fault, and that the fault which caused the collision was the failure of the Clytie to go as near to the tow as she could with safety.

Another fault has been strongly urged against the Clytie, namely that after she had come head to wind and when

The Yacht Clytie.

she saw the *Volante* gathering way across her bows and likely to be caught in passing, she did not swing to westward the six feet that was needed to avoid collision.

The *Clytie's* sailing master upon this point testifies that when his vessel was within a point of head to wind he steadied his helm and kept it steady a few seconds, and when he was head to wind he ported his helm a little. There may be room for the surmise that putting the helm hard-a-port at that time would have caused a failure to tack ; but no witness, as I recollect, has testified that such a result would have been likely to follow such a movement of the helm. The only excuse for not putting the helm hard-a-port instead of porting it a little, given by the sailing master, is that the vessel's headway was then slow and the helm had no effect. But this excuse cannot be received in the face of the specific statement in the answer that at the time of the collision the vessel was going fast enough to steer well. It should also be noticed in this connection, as bearing upon this and other questions of the case, that these two vessels were yachts, subject of course to the sailing rules applicable to all sailing vessels and to no other, but possessing ability to move rapidly and manœuvre quickly, supposed to be fully equipped, and in the charge of skilful men. A prompt employment of their full capacity to avoid collisions may be justly required of such vessels in all cases of danger. What a yacht is willing to do for the purpose of winning a wager, she is in a case of necessity bound to do for the purpose of avoiding collision. While, therefore, it may be said to be requiring much of the *Clytie* to say that she could have avoided the collision by putting her helm hard-a-port after she had come head to wind, in view of the evidence and the answer, it is not easy to absolve her from fault in this respect.

The Yacht Clytie.

There remains to consider the point made in behalf of the Clytie, that the Volante was in fault for not luffing up into the wind as soon as she filled on the starboard tack, and thus avoiding the Clytie, then coming head to wind. It is possible that the Volante, being a very quick vessel, could have done this. Such is the opinion of those on the Clytie. But whether the danger of collision then imminent would be lessened by luffing or keeping full on the part of the Volante was a close question. The decision made carried her within six feet of clear, and no one can say with certainty that by luffing she would have done better. It cannot, I think, be imputed to the Volante as a fault, that of two doubtful measures she adopted one that so nearly carried her clear.

I have now examined all the questions in this case as to which my opinion has been asked. The result of that examination is the conclusion that the collision mentioned in the libel was caused solely by the fault of the Clytie, and that the libellants are entitled to recover herein the damages sustained by reason thereof. There must therefore be a decree in favor of the libellants, with an order of reference to ascertain the amount.

For libellant, *Nath. Viles.*

For claimant, *H. S. Ledyard.*

The Steamboat C. Vanderbilt and the Tug A. B. Preston.

OCTOBER, 1879.

THE STEAMBOAT C. VANDERBILT AND THE TUG
A. B. PRESTON.

COLLISION IN NORTH RIVER.—TUG AND TOW.—CONFLICT OF EVIDENCE.

Where a canal-boat, in a tow coming down the North River, was sunk and the insurance company who paid the loss libelled the steamboat towing the canal-boats and a tug which was helping her, and the owner of the cargo on board the sunken boat also libelled them, both claiming that the sinking was in consequence of a collision between the sunken boat and another boat in the tow, by the fault of the steamboats:

Held, That the only question was whether there was any collision at all, and the conflict of evidence being too great to warrant a finding in favor of the libellants, the libels must be dismissed with costs.

BENEDICT, J. These two actions are brought to recover for the loss of the canal-boat Willie of Greene, and her cargo of coal, a vessel that sank near Yonkers on the North River while in the tow of the steamboat C. Vanderbilt. The canal-boat was insured in the Mercantile Mutual Insurance Company, and that company, having paid the loss, now brings the first of the above actions. The second action is brought by the owner of the cargo of coal lost with the boat.

The allegation of the libellants is, that the cause of the sinking of the Willie was an injury by a collision with the canal-boat Knickerbocker while the Willie was in a tow being made up for the C. Vanderbilt, and the Knickerbocker was being placed in that tow by the tug A. B. Preston, then employed by the owners of the C. Vanderbilt as a helper to assist in making up the tow.

The Steamboat C. Vanderbilt and the Tug A. B. Preston.

The case differs from most collision cases in that the disputed question is not how the collision occurred, but whether there was any collision at all.

In behalf of the libellants there are four witnesses, neither of whom has any pecuniary interest in the suit, each of whom was in a position to know what occurred at the time the Knickerbocker was placed in the tow by the Preston, and each of whom testifies that on that occasion a collision did occur between the Willie of Greene and the Knickerbocker. In behalf of the claimants the captain and part-owner of the Preston, who was on board and in command of the Preston at the time—the deck hand of the Preston, also on board at the time—the collector of the Schuyler line, and a passenger, both of whom were on the Preston at the time of the alleged collision, and the mate of the Vanderbilt, all being in a position to know if a collision had occurred, deny that the Knickerbocker was in contact with the Willie on the occasion referred to. There are, besides, several witnesses from other boats in the tow, more or less favorably situated to know what occurred, who also deny having seen or heard of any collision at the time when the Knickerbocker was brought to the tow by the Preston.

As between these two opposing forces it might perhaps be said that the weight of evidence is with the libellants, inasmuch as none of the libellants' witnesses have any interest in the suit, nor, so far as can be discovered, any motive to fabricate the collision described by them, while one of the witnesses upon the other side is directly interested in the result, and three others likely to be biased in favor of the claimant; moreover, all the evidence of the claimant is to a certain extent negative, while the libellants' witnesses speak affirmatively in regard to an occurrence that, as they say, took place in their presence. If, therefore, I was forced to

The Steamboat C. Vanderbilt and the Tug A. B. Preston.

decide this case upon the testimony as to what occurred at the making up of the tow, I should be inclined to say that the libellants could properly claim to have the weight of the evidence.

But in addition to the testimony in regard to the collision itself, there is evidence in regard to what occurred at the time when the Willie went down and also in regard to the pumping on board of her, and the efforts to call the attention of those on the Vanderbilt to the condition of the Willie after the tow had started.

The testimony given by the captain of the Willie in this branch of the case is disputed in several particulars by witnesses who have no interest in the suit, and a state of facts is shown calculated to create a suspicion that the master of the Willie was not unwilling that his boat should sink. The testimony in regard to what occurred after the alleged collision tends, therefore, to discredit the statement of the master in regard to what occurred when the tow was made up, and leaves the case in such doubt that I am unable to say that I am satisfied to hold that the sinking of the boat was occasioned by injuries received by her from a collision with the Knickerbocker while the tow was being made up.

The libels must therefore be dismissed and with costs.

For libellants, *John McDonald*.

For claimants, *C. & A. Van Santvoord*.

OCTOBER, 1879.

THE SHIP PRIDE OF THE OCEAN.

COLLISION AT SEA.—CROSSING COURSES.—PRACTICE.—SUPPRESSING
DEPOSITIONS.

Where a collision occurred about 65 miles from Sandy Hook, on a clear moonlight night, between a ship loaded with petroleum and sailing S. E. $\frac{1}{4}$ S. within 2 points of close-hauled, on the starboard tack and going 6 or 7 knots, and a schooner loaded with coal and sailing N. E. nearly before the wind with booms all off to starboard and going 4 or $4\frac{1}{2}$ knots, each vessel seeing the other at a distance of two miles and each at the time of collision endeavoring to avoid the other, the schooner by going to westward under a starboard helm and the ship by going westward under a port helm :

Held, That the change of course of the ship was made deliberately, not to avoid a collision but to go astern of the schooner, and that she was in fault for the collision, not having held her course as she was bound to do.

On a motion to suppress depositions of witnesses for claimant because taken before answer :

Held, That no rule of practice requires answer to be filed before taking depositions ; and no prejudice to the libellant in this case appearing, the motion must be denied.

Semble, That where answer is delayed for a purpose, and prejudice to the libellant's case appears, such a motion might prevail, in the absence of any rule.

BENEDICT, J. The vessel proceeded against in this action is in custody, and has been for some reason long detained without making application to be discharged on giving stipulation. I shall not therefore delay my determination of the case in order to specify in detail the portions of the evidence that have led to the conclusions I am about to announce. In regard to many of the facts of the case, there is no dispute. The action is brought to recover for the sinking

The Ship Pride of the Ocean.

of the three-masted schooner George W. Andrews in a collision between that vessel and the ship Pride of the Ocean, that occurred about 65 miles from Sandy Hook, on a clear moonlight night, when vessels could be seen at a distance of two or three miles. The schooner, heavily laden with coal, was on a course N. E. nearly before the wind, with booms all off to starboard and going some 4 or 4½ knots.

The ship was sailing S. E. ½ E. within two points of, close-hauled on the starboard tack, going some 6 or 7 knots. Each vessel was seen by the other at a distance of some two miles. They came together nearly at right angles, the ship striking the schooner on the schooner's starboard bow forward and causing her to sink almost immediately. At the time she was struck the schooner was heading to westward, as all the witnesses agree, and the way in which the vessels came together shows that the ship was then heading south, or, as some of her crew say, further to west than that.

At the time of the collision each vessel was endeavoring to avoid the other, the schooner by going to the westward under a starboard helm, the ship by going to westward under a port helm. As the vessels were sailing when they approached each other, it was the duty of the schooner to avoid the ship, and the duty of the ship to hold her course. The ship did not hold her course, but ported her helm. If when the ship ported her helm she was *in extremis*, by reason of the dangerous approach of the schooner without change, she is free from fault; otherwise she is liable for not having kept her course as required by law.

The claim made on the trial in behalf of the ship is that the only change made in her course was just as the vessels came together, at which time the Captain rushed on deck, and helped to heave the wheel hard down, having been roused by an order to that effect from the second officer in

The Ship Pride of the Ocean.

charge of the deck, and when the schooner was crossing the ship's bows from port to starboard just ahead of her.

This view cannot be upheld.

The account given in the answer is different. The answer states that the ship's helm was ported when the schooner was moving from starboard to port. The testimony of the man at the ship's helm agrees with the answer, and shows that the course of the ship had been altered for the purpose of aiding the schooner in effecting a manoeuvre which it was supposed on board the ship the schooner was about to attempt, namely, to cross the ship's bows instead of going under her stern.

That the ship's helm was ported and her course altered while the schooner was not dangerously near the ship, is plainly proved. Indeed, the man at the ship's helm says that he supposed the vessels were going clear at the time he ported, and the answer asserts that the helm was ported "for greater security in the premises." It further appears that this alteration of the ship's course was before the time of which the master speaks when he says he was awakened by the second mate's order to put the wheel hard down and then jumped on deck to the wheel and helped the man to get the wheel down, the wheel being three-fourths down when he reached it; for the man at the wheel omits all allusion to the captain's presence at the wheel when the wheel was first ported and the ship brought up to the wind until her sails shook. These and other circumstances, which a critical examination of the evidence discloses, have led me to conclude that the cause of the collision was an alteration of the ship's course made, not in alarm but deliberately, and for the purpose, not of avoiding a collision then imminent, but in order to go astern of the schooner.

The Ship Pride of the Ocean.

Such an alteration on the part of a vessel bound by law to hold her course must be held to be a fault.

Before dismissing the case from consideration, I must notice a point raised by a motion made to suppress the depositions of the ship's crew. These depositions were taken in behalf of the claimant under the Act of Congress on due notice but before answer filed. Objection was made to the taking of the depositions before filing an answer, but no answer was filed until the depositions had been taken and filed, and the libellant thereupon, in due time, moved to suppress the depositions for this reason. It is conceded that there is no rule of practice that requires an answer to be filed before depositions are taken on behalf of the claimant, but the necessity of the adoption of such a rule is insisted on. While the case might arise in which prejudice to the libellants would result from being compelled to cross-examine the claimant's witnesses without knowing the ground of defence, no such prejudice has arisen in this case and there is no ground to suppose that any advantage over the claimant was sought to be gained by the delay in filing the answer. There is therefore no foundation for the motion to suppress in this case. In a proper case where the filing of the answer is delayed for a purpose, and the libellant is prejudiced in his case by the withholding of the ground of defence, it may well be that such a motion would be allowed to prevail.

Let a decree be entered in favor of the libellants, with an order of reference to ascertain the amount.

For libellants, *W. W. Goodrich* and *R. D. Benedict*.

For claimants, *H. T. Wing* and *W. R. Beebe*.

 Smith v. Drew and Bucki.

Southern District of New York.

NOVEMBER, 1879.

JOHN SMITH vs. GEO. F. DREW AND LOUIS BUCKI.

CHARTER PARTY.—TONNAGE DUES.—PORT CHARGES.—ACCOUNT STATED.—
PRESUMPTION.

S., the master of a schooner, chartered her in Jacksonville, Florida, to D. and B., to carry a cargo of lumber to Cape Haytien, "charterers to pay all the vessel's port charges at Cape Haytien, including pilotage, consul's fees," etc. The vessel took the cargo and delivered it at Cape Haytien to L., the consignee named in the bill of lading, who was a contractor for the building of a dock for which the lumber was destined, and who had an agreement with the Haytian Government that vessels coming to the ports of Hayti, laden exclusively with materials for the dock and clearing in ballast for a foreign port, were exempted from tonnage dues. This agreement was not known to either of the parties to the charter before the arrival of the vessel at Cape Haytien, and before her arrival the master had executed another charter to take a cargo from Miraguane, another Haytian port. By the laws of Hayti the schooner, before clearing from Cape Haytien for Miraguane, was bound to pay \$381 of tonnage dues. The master claimed that under the charter the charterers were bound to pay the tonnage dues, as being "port charges." The consignee refused to pay them except by deducting them from the freight. This, therefore, he did, and took a receipt for the sum of the freight money, which read that it was "in full for freight, . . . less advances, tonnage dues, etc., paid for my account," which the master signed and he also made a protest against the deduction. The master then filed a libel against the charterers to recover the \$381:

And that the tonnage dues payable at Cape Haytien for the cargo to be taken or landed at Miraguane were port charges payable by the charterers;

That the master being ignorant of the consignee's agreement when the charter was made, his rights under the charter, were not affected by it;

That the presumption would be, not that the vessel was going to leave Cape Haytien on her last trip, but that she would take an outward cargo;

Smith v. Drew and Bucki.

That the giving the receipt did not, under the circumstances, constitute an account stated between the parties, and that the libellant was entitled to recover.

CHOATE, J. This is a suit on a charter party to recover an alleged balance of \$381 of the freight money. The charter was executed in Jacksonville, Florida, on the 20th day of March, 1877, between the libellant, master of the schooner Col. S. W. Razee of Philadelphia, and the respondents Drew and Bucki, lumber merchants. The charter was of the whole of said vessel, with the usual necessary exceptions, for the carriage of a cargo of lumber at a certain stipulated freight, to the port of Cape Haytien in the Republic of Hayti, "charterers to pay all the vessel's port charges at Cape Haytien, including pilotage, consul's fees," etc. The vessel gave bills of lading under which the cargo was deliverable to one Loynez at Cape Haytien, and in due course she arrived at that port and delivered her cargo. The freight amounted to \$1785.19. When the master came to settle his account with the consignee, Loynez, he received \$1069.59, Loynez charging him with \$715.60 as disbursements advanced on account of the vessel. This sum of \$715.60 included, besides other sums not objected to, the sum of \$381 tonnage dues paid at Cape Haytien. The captain objected to this charge, claiming that under the charter the charterers were obliged to pay the tonnage dues as a port charge at Cape Haytien. By the laws of Hayti the captain could not clear the vessel without the payment of these tonnage dues, and the consignee positively refused to pay them except by taking them out of the freight money due; and the captain, in order to clear his vessel and having no other means to do so, accepted the balance which the consignee offered, protesting against the same, and signed a receipt therefor drawn up by the consignee. This receipt was as follows: "Received from C. F. Loynez in

Smith v. Drew and Bucki.

a draft on Pierson & Co., New York, at 30 days, the sum of 1069 $\frac{1}{2}$ dollars in full for freight of a cargo of lumber per the schooner Col. S. W. Razee, less advances, tonnage dues, etc., paid by him for my account. Signed in duplicate, Cape Haytien, May 3, 1877. John Smith." Immediately after this settlement the master noted a protest before the American consul.

By the laws of Hayti every foreign vessel bringing cargo to a port in the country was chargeable with tonnage dues which, by law, were required to be paid at her first port of discharge before she could be cleared from that port, and whether she left in ballast or with cargo for a port out of Hayti or for another port of Hayti to take on there her return cargo. If she went to another port in Hayti she also paid at her first port a fee for changing ports. The cargo of lumber carried out by this schooner was for the use of the contractors to build a wharf at Cape Haytien, who had a special convention with the government of Hayti, under which vessels coming to the port of Cape Haytien, laden exclusively with materials for this new wharf and clearing in ballast for a foreign port, were exempted from the payment of the usual tonnage dues. It did not appear that this special agreement was known to either of the parties to this charter-party prior to the arrival of the vessel at Cape Haytien, and by a charter for a return cargo, entered into by the libellant before his arrival at Cape Haytien, the vessel was bound to go to Miragoane, another port in Hayti, to load with a cargo, thence to Boston. She was therefore liable, before she could clear from Cape Haytien on her projected homeward voyage, to pay this sum of \$381 tonnage dues at Cape Haytien. And soon after her arrival a question arose between the captain and the consignee as to whether the consignee or the ship should pay it. At the time this matter was arranged, as

Smith v. Drew and Bucki.

above stated, it was understood between the captain and the consignee that the captain would make a claim on the charterers for this sum which the consignee refused to pay otherwise than out of the freight money.

Several objections are now made by the charterers to the recovery of this sum: (1), that tonnage dues are not port charges; (2), that, if tonnage dues are port charges, yet these dues, though payment was required at Cape Haytien, were not levied as tonnage dues *for* that port, but as tonnage dues for the port of Miragoane, and therefore, and under the particular facts of this case, that they were not tonnage dues "at Cape Haytien" within the meaning of this charter-party which the charterers were bound to pay; and (3), that the libellant is precluded from claiming this sum from the charterers by his assenting to an account stated and by his receipt of the balance paid him in full of that account at Cape Haytien.

1. I think there can be no question that tonnage dues are port charges.

2. The claim that these were dues for the port of Miragoane rests on the testimony of certain government officials at Cape Haytien, that this exaction is made, not for the port of discharge, but for the port where the return cargo is taken on board. They indeed give it as their opinion and understanding that the tax is levied on account of the cargo exported, but as it is uniformly exacted at the first port at which the vessel arrives, I think it is properly described, and must be held to be within the contemplation of both parties, a port charge at that port, whatever may be the grounds which actuate the government in imposing it. All that parties entering into such a contract in a foreign country can be presumed to know about it is, that it is exacted at the first port, and therefore it is properly to be considered as a port

Smith v. Drew and Bucki.

charge for it that port, as they look at the matter. The statement drawn by these witnesses is, it seems to me, a statement without a difference, so far as this contract is concerned. It is said, however, that, in this particular case, if the vessel had come home in ballast from Cape Haytien she would not have been chargeable with any tonnage dues, and hence it is argued that as this charter-party provides for the outward voyage only, ending with the delivery of the cargo, it was not within the purview of the contract that the charterers should be made chargeable with any burden to enable the ship to bring home a return cargo, and that neither legally nor equitably is the libellant entitled to charge this payment on the charterers under this charter-party. The answer to this argument is, I think, conclusive that the parties must have contemplated the payment of tonnage dues, since the private agreement between the consignee and the respondent did not enter into their calculations, and the mere fact that by that agreement the consignee was relieved from paying it should not charge it upon the ship as between her and the charterers, nor can this court assume, as insisted on the part of the respondents, that the ship, within the contemplation of the parties to this contract, was to return from Haytien without cargo. On the contrary, there being nothing in the charter to restrict the ship-owner in this respect, this court will assume that it was understood that the ship would bring back a cargo if the same could be obtained. I see no equity in the respondents' position if these dues are properly held to be port charges at Cape Haytien, for it is distinctly agreed that the ship shall not be charged with them, and so far as either party knew when the contract was made they had to be paid, and certainly not by the ship.

X The defence of an account stated cannot avail the respondents because the captain did all that he could do to in-

Smith v. Drew and Bucki.

duce the consignee to pay these charges, and simply took all he could get of the freight from the consignee, without waiving any rights against the charterers. He was compelled to submit in order to clear his vessel, and the settlement that he made did not purport and was not understood by either party to be a settlement with the charterers, but only with the consignee of the cargo, who claimed that he was relieved of the charge by favor of the government, and did not profess or undertake to settle the account as between the ship and the charterers. It is evident that a clear case is made out which overcomes the *prima facie* case made by the account and receipt. The recital in the receipt that the payment was on the captain's account, was inserted by the consignee; so far as appears, it was not specially called to the attention of the captain and is inconsistent with the fact, as proved by the evidence.

Decree for libellant for \$381 and interest from May 3, 1877, and costs.

For libellant, *R. D. Benedict*.

For respondents, *G. H. Fletcher*.

The Steamboat Orient.

NOVEMBER, 1879.

THE STEAMBOAT ORIENT.

SEAMEN'S WAGES — COLLISION. — FOREIGN VESSEL.

The wages of seamen have a priority over a claim for collision against the master of such vessel, whether such wages were earned prior or subsequent to the collision.

Whether the same rule would be applied in the case of a foreign vessel, *cert.*

Ans. It would, a vessel owned in New Jersey is not such a foreign vessel as to call for the application of any different rule.

OPINION. This is a suit for seamen's wages, and after judgment of the owners of the steamer and a decree in favor of the seamen but before the sale of the vessel, the insurers on the part of a canal-boat which was totally lost by a collision with the Orient while the canal-boat was in tow of another steamer applied by petition for leave to intervene for their reasons and to have the decree opened and to be allowed to collect. They claim that the Orient is responsible for the collision on the ground of negligence; that the value of the Orient is not sufficient to pay in full the seamen and the damage to the canal-boat caused by the collision, and that in such case the loss of the party injured has a preference over the loss of the steamer. The petitioners have paid the loss and compensated the rights of the owner of the canal-boat. Another suit is pending in this district against the Orient. For the master of the canal-boat on behalf of himself and the owners of the cargo, and is now prosecuted on behalf of the insurers on the cargo. The petitioners have

The Steamboat Orient.

been allowed to file an answer to the libel of the seamen, denying that the amounts claimed are due to them. This question has, however, been now heard and the wages are shown to be due to the libellants as follows: Willetts, \$47.50; Collins, \$94.84; Murphy, \$94.84; Leather, \$33.81; Bills, \$50; Schreier, \$50, in all \$370.99. The collision happened September 25th, and the vessel was seized by the marshal on process from this court October 11, 1879. The wages due were earned partly before and partly after the collision.

The petitioners have an interest, which, if they have a prior lien to the seamen, would require that the proceeds of the vessel be kept in the registry of the court until the rights of the parties shall be determined. They now ask this relief in case the wages shall be found due. Several foreign decisions are cited to sustain this claim. The first is the case of *The Benares*, 7 Notes of Cases Suppl. 50. This was an action for damages against the Benares by collision in which bail had been given for the ship and also for the freight. And the question arose, on a motion that the bail should pay the amount of the freight into the registry, whether the amount, to be paid in under the English Act limiting the liability of the owners, was the gross freight or the net freight. The owners claimed that they should deduct from the freight all the expenses of the voyage, which was to India and back to England, including the whole amount of seamen's wages. And it was held that the statute intended by "freight due or to grow due for and during the voyage" the entire freight; that this expression could not be construed to mean the freight, less those expenses usually paid out of it or for the payment of which there was a lien on the freight. There was no claim of seamen here competing with the claim of the party injured by the collision, but simply a claim of the owners who had paid wages to deduct them from the freight

The question which would be the
... and the opinion of Dr.
... There is not
... the seamen's lien for
... the decision. The
... is the only other re-
... seamen's wages
... was opposed by a
... against the vessel in a
... insufficient to meet all
... in such a case, there
... owners were insolvent,
... should be paid
... He applied to
... which governs cases of mar-
... that a party
... against a party hav-
... be remitted to the
... And as the
... liability of the owners
... was assigned by the court to
... actual value to the other
... so: that in such a
... the only fund to which
... be merely to benefit the
... a part of the liability which
... the injury inflicted by them. I
... of the decision. The learned Judge
... that it is not to be forgotten that in all these
... the cause of the damage is
... of the persons composing the crew." I
... to rest in any considerable
... On the contrary, this seems

The Steamboat Orient.

to be thrown in merely as a suggestion, showing that in many cases no real injustice will probably be done by the application to a case like that before the court of the equitable doctrine of marshalling assets. The case is by no means an authority that, upon the sole ground of punishment for misconduct or retaliation, the seamen of the offending ship forfeit any of the rights which the maritime law gives them against their own vessel for their wages. Nor is this case an authority for the position that English seamen would, as against English parties suing in an English court for damage by collision, be remitted to their personal remedy against their English owners. The principle of marshalling assets would seem not to go so far. The important fact assumed by the court as existing, that the party injured would stand no chance of obtaining redress in a foreign court for any balance due to him of the owner's liability, would not exist in such a case. It could not be assumed that in an English court the party injured would not receive full justice against the owners equally with the seamen, and in such a case they would not be subjected to the expense, delay and uncertainty of a resort to a foreign tribunal, perhaps in a half-civilized country, whose law might be wholly inadequate for their relief. Dr. Lushington says, in that case, "in case of a *foreign ship* doing damage and proceeded against in a foreign country, the injured party has *no means* of redress save by proceeding against the ship herself, which I apprehend is one of the most cogent reasons for all our proceedings *in rem*." The only other English case cited is *The Chimæra*, unreported, but stated in *The Linda Flor* to be precisely like that case. It must be assumed, therefore, that it was the case of *foreign seamen* competing with English parties who had a claim for damages by collision. The case of *The Duna*, 13 Ir. Jurist, was the case of a Russian ship proceeded

The Steamboat Orient.

against in the Irish Admiralty Court. It was like the case of *The Linda Flor* and is decided on the authority of that case. In the case of *The Enterprise*, 1 Lowell 455, the same rule was applied as against British seamen, on the ground that the law of Great Britain controlled the case. And Judge Lowell there says: "I believe no admiralty court of the United States has decided the general question of the order of priority of these liens." The equitable doctrine of marshalling assets undoubtedly prevails in Admiralty courts and will be applied where its application will do no injustice. Thus even in a case of seamen's wages where there are two funds to which they can resort, as the ship and the freight, each equally available and equally certain, they may for the benefit of other parties having only a claim on the ship, be decreed to be paid out of the freight. (*The Sailor Prince*, 1 Ben. 466.) Perhaps the application of this doctrine as made in the cases of *The Linda Flor* and *The Duna* would, as against foreign seamen, be held in this country a reasonable application of that doctrine, although it remits the seamen to a remedy far less certain and expeditious than their remedy against the ship. But whether the same rule would obtain here it is unnecessary to inquire, because, as it seems to me, the principle of those cases, so far as it is a principle of the marshalling of assets, does not apply to the present case. This steam-tug was registered in New Jersey. Her owner lives in the district of New Jersey. It cannot be said that the injured party will be practically without redress there. Throughout the United States the courts are open to him as freely and with equal chance of justice as to the seamen. New York and New Jersey do not stand in this respect in relation to each other as did England and Portugal or Ireland and Russia. In the case of *foreign seamen* the question how far a court of Admiralty shall take jurisdiction of their

The Steamboat Orient.

suit for wages, is a matter of discretion, and this being so the court is bound to look in the exercise of that discretion to the rights and interests of all other parties; and this might justify these English decisions as the rule to be applied here in the case of a foreign ship presenting the like equitable considerations for remitting the seamen to their home tribunals.

The later editions of Abbott, on Shipping give some countenance to the idea that these English cases have established the rule independently of the nationality of the ship, that a lien for damage by collision takes precedence of the lien for wages, on "considerations of public policy to prevent careless navigation." (*Abbott on Shipping*, 11th ed. p. 621.) As no other authority is cited for this proposition than the cases above referred to, I think the point cannot be deemed established by authority. Indeed, in the same work (p. 633), it is admitted that "the priority of the lien for damage over liens *ex contractu* is not expressly declared in any of the foreign maritime codes, or discussed by the commentators upon them." The learned author then adds, "but it seems to result from the unqualified terms in which the liability of the owner of the wrong-doing vessel to the extent of the value of it, is every where laid down." With deference to the great authority of Lord Tenterden on a question of this character, I think it must be said that these dicta go far beyond any decided case. And I fail to see how the rule of the maritime law, limiting the liability of ship owners, and especially how the statutory limitation of that liability in England and the United States, affects the question. The primary and apparently the only purpose of these statutes, was to limit the liability of owners and not to impair the rights of any other party; and if, in consequence of other claims against the ship or freight, the injured party cannot

The Steamboat Orient.

of which is a part of the primary fund, that is, the ship and the cargo, the limit of the statutory limit, or the owner cannot release the ship from other claim and incumbrance thereon, subject to the thing against which the injured party has a claim, in such condition as to satisfy that limited liability. I see no reason why, in cases of domestic ships, at least, the injured party should not, for the unsatisfied balance, be entitled to his personal remedy against the owner. Against this I cite the authority of the same author in the same volume as of his work on shipping. (4th Amer. Rep. Int. L. p. 484. "In proceeding against the ship in preference to the owner thereof be insufficient to discharge all the claims of the seaman's claim for his wages is preferred to all other charges, for the same reason that the last mortgage is preferred to those of an earlier date. The owner of the steamship, having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it, which otherwise they could not have done." This doctrine seems to be well supported by authority and to be applicable as well to claims for collision as to other claims unless this policy of retaliation or retribution for the wrong done by the ship is also a rule of the maritime law. That doctrine seems to me inconsistent with the maritime policy declared by courts of Admiralty in respect to seamen's wages and to have no foundation. It is true that for misconduct towards their own ship seamen are punished by the forfeiture or diminution of wages in some cases but both in England and the United States this species of punishment is carefully regulated by statute and strictly guarded against abuse, and these regulations have never extended to any case of misconduct except towards the seamen's own ship and her officers. To hold all the seamen of the offending ship liable to punishment by a partial

The Steamboat Orient.

or entire forfeiture of their rights would be a wholesale condemnation of innocent and guilty alike, and not in accordance with the probable facts of the case or with natural justice; and I see no such equity of the injured party, and no such controlling policy to prevent careless navigation, as to require this. Depriving seamen of their lien and remitting them to their personal action is a partial deprivation of their rights. It is in the nature of a forfeiture or punishment. The remedy to which they would be remitted is neither so certain nor so expeditious, and the rule contended for, if applied, does seriously impair the rights of seamen not shown to be personally guilty of any wrong.

By an amendment of their answer these petitioners have charged personal negligence against some of the libellants as an additional ground for giving the petitioners a priority of payment. This raises the question whether such a charge of negligence is a bar to the enforcement of the seamen's lien for wages as against the injured party. I think not. It would be in the nature of a partial or qualified set off. If these petitioners have any claim against the seamen the courts are open to them. Seamen's wages are by statute, upon reasons of public policy, scrupulously guarded against attachment and claims by way of set off. While no statute governs this particular claim, it is enough that there is no precedent for it, and that it is contrary to the general policy of the law, which secures to seamen summary and certain relief for their wages. And I am not willing to set a precedent for the trial in a case of seamen's wages of the merits of a collision suit. If this defence is good, then whenever the offending ship is not of value sufficient to respond in damages and the owners do not care to defend and are of doubtful solvency, the whole burden of defending the collision suit will be thrown on the seamen, a burden which they are ill

SOUTHERN DISTRICT OF NEW YORK,

The Steamboat Deer.

prepared and in most cases would be wholly unable to bear. The advantage of the injured party seeking his redress in the courts against the seamen, if they are personally liable, seems to me to be in accordance with justice and the general policy of the maritime law.

A dissenting opinion of Judge Giles, of the Maryland court, is in a case apparently similar to the present, makes a distinction between the wages earned after the collision and those earned before the collision, as to the former giving them a preference to the lien for damage by collision and as to the latter giving priority to the claim for damages. No authorities are cited. It may be presumed that the decision is based on the cases above referred to. For the reasons above stated I am unable to concur in that decision as it is in opposition to the claims of the seamen.

Verdict for the Plaintiffs, with costs.

For the Plaintiffs *E. L. Niles* and *F. A. Wilcox*.

For the Defendants *E. D. McCarthy* and *W. Mynderse*.

NOVEMBER, 1879.

THE STEAMBOAT DEER.

ACTION FOR EXONeration.—LACHES.—SETTLEMENT.

A suit was brought by a married woman as owner of a canal-boat against a steamboat for the value of the boat and her cargo, lost by negligence in a collision. A decree was made in her favor on March 4, 1871, for

The Steamboat Deer.

\$2737.66 damages and \$331.91 costs. In May, 1871, an agreement to compromise was made between the proctors, and the stipulators paid \$2,000 in settlement. The owners of the cargo were parties to the settlement and the husband of the libellant was present and consented to it and also her proctor, who had since died. In March, 1879, a motion for leave to issue execution against the stipulators was made on behalf of the libellant, on her affidavit that she did not authorize the settlement and received no part of the \$2,000:

Held, That the facts as to the settlement created so strong a presumption of acquiescence on the part of the libellant that it was not overcome by her affidavit, and that in any event she could only enforce the decree for the amount of her interest in it, and, as she had not shown what that was, her motion must be denied.

CHOATE, J. This is a motion for leave to issue execution to enforce a decree against stipulators. The suit was brought by the libellant, Mary A. Corwine, to recover the value of a canal-boat and her cargo, lost through the fault of the Deer. A final decree was entered in favor of the libellant on the 4th day of March, 1871, for \$2737.69 damages and \$331.61 costs. An appeal was taken but never proceeded further than the giving and filing of notice of the appeal. In the month of May, 1871, negotiations for a compromise of the suit were pending between the proctors representing the parties, and on the 18th day of said month the stipulators paid in settlement of the suit \$2,000. It is proved that the owners of the cargo of the canal-boat, or those who had succeeded to their interest, were parties to this settlement; that it also was consented to by the proctors for the libellant, the law firm of Platt, Gerard & Buckley, and that the husband of the libellant, who had been the master of the canal-boat, was present at and consented to the settlement. The final decree does not show what part of said damages, if any, was awarded for the value of the canal-boat. The pleadings in the case cannot be found and there is no evidence produced

SOUTHERN DISTRICT OF NEW YORK,

The Steamboat Deer.

It is to be noted that of damages this libellant claimed in her petition. It thus appears to show that she was suing on behalf of the owners of the cargo on board the canal-boat as well as on her own behalf. This motion was not made until the 22d day of March, 1879. The libellant has sworn that she did not authorize the settlement and received no part of the same.

Under these circumstances the motion must be denied. It would be improper and unjust towards the stipulation if the settlement was unauthorized by the libellant, to allow her to recover for any sum beyond the amount received by the libellant on her own account. Moreover, the testimony of her part, in connection with the fact that her husband was present at the settlement and that her husband, especially through Mr. Buckley, now dead, took part in it, creates so strong a presumption of acquiescence on her part that I think it is not overcome by her testimony. It is now the burden is on her of showing what interest she had in the matter.

For the libellant T. C. Croppell.

For the defendants J. L. Greer.

The Steamer Baltic.

NOVEMBER, 1879.

THE STEAMER BALTIC.

COLLISION.—DAMAGES.—AGREEMENT TO REPAIR.—DEMURRAGE.

A bark, having been injured by a collision with a steamer, arrived in New York, where the agents of the steamer repaired the damages. The owners of the bark then filed a libel to recover demurrage for the detention of the bark while being repaired. The owners of the steamer set up that it was agreed that the repairing of the damages should be in full satisfaction of the claim. They also claimed that they could have hurried the repairs so as to have finished them in much less time, if the master of the bark had informed them of an offer of a charter which it appeared he had and which he refused because he was not certain that his vessel would be ready in time to begin to load under it:

Held, That the burden was on the steamer to establish the agreement that the making the repairs should be in full satisfaction for all damages, and that on the evidence she had not established it;

That the master of the bark was not bound to have communicated to the agents of the steamer the offer of a charter which he had had; that his refusal to accept it was in good faith, and that the libellants were entitled to recover demurrage for the detention of the bark.

CHOATE, J. This is a libel to recover damages for a collision which occurred between the Norwegian bark Plutarch, of which this libellant was master and part-owner, and the steamer Baltic, on the 2d day of June, 1879, while the bark was bound on a voyage from Bordeaux to New York in ballast. The libel avers that "the bark continued on her voyage, and, on or about the 19th day of June, arrived in the port of New York; that the owners of the said steamer then assumed and superintended the repairs to the bark necessary to fit her for sea, and agreed to pay therefor; that the said bark, pending the completion of said repairs, was

The Steamer Baltic.

unfit for sea, and her owners lost the use and employment of her and were subjected to considerable expense for the maintenance and wages of the crew during the said period and for wharfage and other expenses." No question is made as to the responsibility of the Baltic for the collision, and it was shown that the repairs were paid for by her owners. The only question is whether she is liable for the detention of the vessel during her repairs. On this point the answer avers, (2d), "immediately on the arrival of the said bark in the port of New York at the termination of the voyage mentioned, it was agreed between the libellant and this claimant that this claimant should make, at its own expense, all the repairs necessary to restore the said bark to as good a condition as she was in before the said collision, and that the said libellant should allow the said claimant to make the same, and that the making by the said claimant at its own expense of the said repairs should be in full satisfaction and discharge of the said supposed cause of action alleged in the said libel and of all damages sustained by the libellant or by the owners of the said bark by reason thereof." The answer then avers performance of this agreement on claimant's part. It also avers, (3d), "immediately after the arrival of the said bark in this port, as aforesaid, this claimant offered to prosecute the same (*i. e.*, the repairs), day and night, and this claimant offered that its said workmen should accompany said bark if it should go to any place in search of cargo, and it could have completed the said repairs in the space of three days, but the libellant then and there informed the claimant that the rates of freight were then so low that he preferred not to accept the same, nor to charter the said bark at that time, but to wait until such rates of freight should rise, and that the said claimant should and might make the said repairs at its own convenience; that the claimant, rely-

The Steamer Baltic.

ing on the said statement so made, used only ordinary and reasonable diligence in and about repairing the said bark, and did not use extraordinary diligence in and about the same, as otherwise it would and could have done, and said vessel could easily have been taken from the pier at which she was lying to any other pier or port and have taken on cargo while said repairs were going on."

The proof is that before the arrival of the bark the claimant's agent sent a letter to be delivered to her master by the pilot, requesting him, immediately on his arrival, to call at the office of the respondent company, the owners of the Baltic, and that the claimant had also instructed a competent mechanic to be ready to have her repaired on her arrival. She arrived on Thursday the 19th of June, and on Saturday, the 21st, this libellant, her master, and his consignee, Mr. Boyesen, called at the office of the claimant company and there met Mr. Cortis, the managing agent of the company. The agreement set up in the second article of the answer that the claimant should repair the bark and that this should be in full satisfaction of all claim for damages by reason of the collision, was made orally during that conversation, if at all. There are three witnesses to what took place at that time, Mr. Cortis, Mr. Boyesen and the libellant. It is insisted on behalf of the claimant that the fair result of the testimony, considered in the light of the surrounding circumstances, is that the parties reached an understanding to the effect set forth as an agreement in the second article in the answer, although it is conceded that nothing was said in terms to the effect there set forth as to the repairs being in full satisfaction. This understanding, it is said, is to be properly inferred from the conversation as related by Mr. Cortis. His account is that, when they came in, he addressed the captain and said, "Captain, you had a slight collision on

The Steamer Baltic.

the Banks, I believe," to which the captain answered that he had; that he then said to the captain that it was their steamer, the Baltic, and asked the captain what was the extent of the damage, and the captain replied \$800 or \$900, he thought; that the captain said that the steamer had been handled in a masterly manner and was commanded by a good man; that he then told the captain that he would send a man on board and have the damages repaired to his satisfaction; that, as the damages were of a nature that would not prevent loading the vessel, the carpenters could go with her wherever he wanted to go to load, so that there would be no detention; that the captain then said he was satisfied, or all right, or something to that effect, and bade him good morning and left.

By the testimony of the captain and of Mr. Boyesen it appeared that when the subject was introduced and Mr. Cortis admitted that it was the Baltic which collided with the Plutarch, Mr. Cortis did not admit that it was the fault of the Baltic, but said in effect, "I don't know, captain, who is in fault in this business, but any way I will repair it for you." To which the captain said "all right" or "thank you." The testimony of Mr. Boyesen and of the captain is inconsistent with there having been anything said about the carpenters accompanying the ship so that there need be no detention, from which remark especially the inference is drawn of a waiver of all claim for demurrage and the acceptance of the agreement to repair as a full satisfaction. The witnesses are all of unquestioned character and intelligence. Upon the whole testimony I am not satisfied that any such remark was made or that the captain or Mr. Boyesen came away from the interview with any understanding on their part that what was offered to be done by the company was offered in full satisfaction, or with any condition that the captain

The Steamer Baltic.

should waive any claim he might have for demurrage, or that anything was said which should have led them to believe that that was Mr. Cortis's meaning or understanding. The defence set up is the making of a special agreement, as to which the burden of proof is on the claimant, and that burden he has not sustained. Nor is such an agreement to be inferred from the circumstances under which the offer to repair was made. Very likely Mr. Cortis had the idea in his own mind that he would avoid all claim for demurrage by promptly offering to repair the bark, and if no detention had in fact occurred, the course taken by him, which is certainly to be commended, would have had this effect. That he now thinks the subject was mentioned does not admit of any doubt, but the minds of the parties did not meet, so as to form a contract binding on them.

The evidence as to the detention is that before the claimant had commenced the repairs, the libellant, who came to this port with the intention of carrying a cargo of petroleum to Europe, was offered a charter by a broker, and that he refused it because he was not certain when the vessel would be repaired, and by the charter-party he would be obliged to agree to be ready for sea by the 16th of July, and to begin to load about ten days before that. He did not communicate this offer or the rejection of it to the claimant. No other charter offered till the 8th of July, when the repairs being nearly finished, he accepted a charter on the same terms on which the former charter had been offered. The repairs were commenced on the 24th of June and finished on the 11th of July. It was shown that by working night and day they could have been finished in eight working days, or by the 4th of July. The claimant did not offer to have the repairs go on night and day, and for a night's work the wages of the workmen would have been double

The Steamer Baltic.

what they were for a day's work. There was no proof of any special agreement such as is set up in the third article of the libel. It was shown that the vessel could have been safely moved while the repairs were going on and that cargo could in fact have been put on board of her by the 6th of July: that is, the repairs would not have prevented the commencement of her loading on that day and its prosecution afterwards.

It is insisted by the learned counsel for the claimant that the libellant was bound to communicate to the claimant the offer of a charter made to him; that if he had done so the claimant might have given orders for prosecuting the repairs more promptly or might have guaranteed that the vessel would be ready in time to receive her cargo under it; that as the libellant did not communicate this fact he is estopped to claim demurrage. This seems hardly to be the defence intended by the answer, but assuming that it is so, I think there was no duty to communicate the fact. The libellant could not then know whether even with great diligence he could safely agree to be ready for sea by the 16th of July. Although he knew in a general way the nature of the injury to the vessel, yet until the repairs were commenced it was a matter of uncertainty how long a time they would take. The claimant had proposed what should be done, and if it desired to know of any offers made to the libellant for a charter it could easily have required the information, but in the absence of such request the libellant had no reason to believe that the claimant would make any change in the plans in consequence of this offer. I think his rejection of the offer was made in good faith and not because he was waiting for freights to rise. I see no duty on his part to communicate the offer, under the circumstances of this case. It is also claimed that he informed the claimant that he was

The Steamer Baltic.

waiting for better freights and that the claimant was thereby led not to repair as promptly as it might. It is true that in the law of estoppel *in pais* "when an act produces conduct from which flows injury, it cannot matter whether that conduct be affirmative or negative, active or quiescent." (*Cont. N. Bank v. Bank of the Com'th*, 50 N. Y. 586.) There is some evidence that the captain, in conversation with the men employed by the claimant to do the work, said something about his waiting for freights to rise. The captain having been examined before trial, has had no opportunity to testify since this evidence was taken. But I do not think these men stood in such a relation to the matter that what he said to them was any notice to the claimant, nor did the claimant act upon it. There is, therefore, no estoppel growing out of it. And so far as this testimony is relied on as showing that the captain rejected the first offer, not because he thought he could not comply with the terms of the proposed charter, but because he thought freights would improve, I think it is entitled to very little weight and is clearly overborne by the other testimony in the case.

• The libellant is entitled to a decree for sixteen days' demurrage, and costs, with a reference to compute the amount, unless the amount is agreed to.

For libellant, *Thos. E. Stillman*.

For claimant, *E. P. Wheeler*.

NOVEMBER, 1879.

JOB M. LEONARD ET AL. VS. MARK WHITWILL.

**COLLISION AT SEA.—BRITISH STEAMER AND AMERICAN SCHOONER.—FOG.—
SPEED.—TORCHLIGHT.—LAW OF THE SEA.—APPORTIONING DAMAGES
WHERE BOTH VESSELS ARE IN FAULT.—CARGO.—PARTIES.**

A schooner belonging to citizens of the United States was sunk and totally lost with her cargo in a collision with a steamer belonging to a citizen of Great Britain, at sea, off the east end of Long Island, on the night of April 17th, 1877. The wind was from the E. S. E., about a two and a half to three knot breeze, and the schooner was on the starboard tack heading N. E. by E. The steamer had been running on a course E. by S. $\frac{1}{2}$ S. from the Lightship off Sandy Hook, at a speed of about seven knots an hour. There was a dense fog at the time of the collision, which shortly afterwards cleared up. A fog horn was being blown on the schooner and continued to be blown after the whistle of the steamer was heard, and her course was kept till the instant of collision. Her lights were set, but the steamer was approaching her at such an angle that they were not visible, and she showed no torchlight. The second mate of the steamer was on her bridge in charge of her navigation. The sound of the fog horn of the schooner was heard on the starboard bow of the steamer, her engine was at once slowed and her helm put hard-a-starboard. The captain was also signalled to come to the bridge, and, as soon as he came, he ordered the engines to be stopped and reversed. The lookouts and the officers on the bridge kept a sharp lookout for the vessel whose horn they heard, but they could not see the schooner till she was close under the steamer's bows. The headway of the steamer was almost stopped at the time of the collision, but she struck the schooner on her port side about forty feet from her stern, and the schooner, which was loaded with coal, shortly afterwards sank. The owners of the schooner filed a libel against the owner of the steamer to recover for the loss of the schooner, her freight and her cargo:

Held, That, the schooner having kept her course, it was the duty of the steamer to have kept out of her way;

That, under the circumstances of the density of the fog, in which the steamer was navigating, and the liability, in that part of the ocean, to fall in with

Leonard *et al.* v. Whitwill.

- vessels, the speed of the steamer was not a moderate speed, as she was not under such control that she could be stopped in time to prevent a collision with such vessels as she might expect to meet;
- That the starboarding of the steamer's helm was proper, but that she was in fault in not stopping immediately upon hearing the fog horn;
- That the schooner was in fault for her failure to show a torch light on hearing the steamer's whistle, as required by the Act of Congress of 1871 (16 Stat. at Large, p. 459, now § 4,234 of the Revised Statutes), and that the facts that the steamer was a British vessel and the collision was on the high seas, did not prevent the respondent from setting up such failure as fault in this action;
- Whether, independent of the statute, it would have been a fault under the general maritime law, that the schooner failed to exhibit a torch under these circumstances, *quære*.
- That, the schooner being in fault in not having shown a torch, it became necessary for her to show that such fault had not contributed to the collision, and that she had failed to do so;
- That, both vessels being in fault, the damages must be apportioned;
- That the owner of each vessel must bear half of the loss; and that the owners of the schooner must bear half of the loss of the cargo and of the seamen's effects; and the decree should be that the whole damages caused by the collision be apportioned between the parties;
- That it was unnecessary to make the owners of the cargo of the schooner parties to the suit, they being already virtually before the court through the libellants, the owners of the schooner.

CHOATE, J. This is a suit *in personam* brought by the owners of the American schooner J. M. Leonard of Fall River, and her master and crew, against the owner of the British steamship Arragon, to recover the value of said schooner and her cargo and freight, and the personal effects of the master and crew, alleged to have been totally lost in consequence of a collision between the schooner and the steamship on the 17th of April, 1877, the total value as stated in the libel being \$30,686.25. The schooner, which was of 408 tons register, was bound on a voyage from Philadelphia to Providence, R. I., with a cargo of 549 tons of coal. The steamship, a propeller of 837 tons register, was bound on a voyage from

Leonard et al. v. Whitwill.

the port of New York to the port of Bristol, England. The collision happened a few minutes after eight o'clock in the evening. The libel puts the place of the collision "in the Atlantic ocean, off the eastern end of Long Island and distant about fifteen miles therefrom." The answer denies this and avers that it was "about fifty-one miles east from Sandy Hook and south of the Long Island shore between Fire Island light and Shinnecock light and about eighteen or twenty miles southeast by east of Fire Island light." This question of the place of the collision is chiefly important, if at all, as bearing on the question of the speed at which the steamer was running. It is admitted by the pleadings that the schooner was heading N. E. by E. on her starboard tack, the wind being E. S. E. The schooner was sailing by the wind with all sail set except the main-top sail and mizzen stay sail, which had been furled upon the setting in of the fog about two hours before. The wind was light but steady. The parties do not differ substantially as to its force. Those on the steamer estimated it to be a $2\frac{1}{2}$ to 3 knot breeze, and the mate of the schooner, the officer of the deck at the time of the collision, at about $2\frac{1}{2}$ knots. Prior to any change by reason of hearing the fog horn of the schooner, the steamer had kept a true east course from the light-ship; by her compass, as testified to by her master, E. by S. $\frac{1}{2}$ S. A fog set in soon after six o'clock which grew quite dense and continued till a few minutes after the collision, when it cleared up. How dense this fog was and how far it obscured the sight of objects on the water and lights at the time of the collision, is a question seriously contested in the case. Before the collision the fog horn of the schooner was heard on the steamer once only, a little on the starboard bow, and, in consequence thereof, the wheel was starboarded and the engine slowed and afterwards stopped and reversed. Before

Leonard *et al.* v. Whitwill.

the collision the whistle of the steamer was heard on the schooner, and her masthead and starboard lights were seen, and after the whistle was heard the fog horn of the schooner was several times blown. It is conceded that the schooner kept her course till the instant of collision. Of course it was the duty of the steamer to keep out of the way of the schooner and, *prima facie*, the responsibility for the collision rests on the steamer. Each party, however, charges the other with faults as causing or contributing to cause the disaster.

The libel charges against the steamer "that the collision occurred solely through the negligence and want of care and improper conduct of those in charge of said steamer Arragon, in that the said steamer was run at a dangerous and excessive speed in said fog, and was improperly and carelessly navigated, and without sounding her whistle at proper intervals, and no sufficient lookout was kept on said steamer, nor proper measures taken to avoid said collision by stopping and backing the said steamer, or avoiding the said schooner." The answer, after denying all these alleged faults or acts of negligence and alleging that so far as the steamer was concerned, the collision was the result of unavoidable accident, charges against the schooner that "she was short handed and over laden, and that when the whistle of said steamer was heard by those on board of said schooner it was their duty immediately to have shown a lighted torch upon the part of said schooner towards which the said steamer was approaching; that as the vessels were approaching each other the side light of the said schooner could not be seen from the steamer before the collision, nor could said schooner herself be seen until she was within a few feet of the steamer; that if said torch had been so exhibited it would have been visible to those on board of said steamer, even before the said

flag was heard, and would have shown to them that said steamer was crossing the bows of said steamer from starboard to port, and would have been seen in time so that said steamer's helm could have been ported and her head swung off to starboard, or her swing to port under the starboarding of her helm could have been stopped so that the vessels would have gone clear of each other."

It is very evident from the testimony that at the time the vessels came together the headway of the steamer was nearly stopped. Although, as she approached, she seemed to those on the schooner to be moving rapidly, yet the most satisfactory evidence on this point is the effect of the blow on the schooner. The schooner was passing the steamer's bow nearly at right angles and the stem of the steamer struck the schooner just forward of the mizzen rigging, yet did not strike with force enough to sink her instantly or cut her in two as has happened in some collisions. The steamer seemed to those on the schooner to strike more than once. The vessels brushed by each other, the steamer passing under the schooner's stern as the schooner, still moving forward, came up before the wind on the port side of the steamer after she was struck. The man at the wheel of the schooner remained at his post till the collision. He observed that the blow slewed the schooner so that she headed N. E. $\frac{1}{2}$ E. thus changing her heading a half point to the northward. Most of the crew of the schooner got into her boat which was hanging at the davits. They had time to get into the boat and get her in the water and pull a little way off before she sank. They had no time to save anything. It appears also that the steamer did not get far off from the schooner, and after the collision the schooner was lying on her port quarter a little astern of her. These circumstances show, I think, that while the blow was enough to crush in her port side, so

that she rapidly filled with water, it was not delivered with any great velocity. Both vessels were shown to have their side lights properly placed and brightly burning. On the schooner it had struck eight bells when the whistle of the steamer was heard, but the watch had not been changed. It had been the mate's watch and he was still on deck on duty. There was a lookout forward who had charge of the fog horn and there was an able seaman at the wheel. Before the collision the rest of the crew got on deck.

On the steamer it had been the second mate's watch from six to eight o'clock and he was still on the bridge up to the time of the collision. The captain had been with him until a few minutes before eight o'clock, when he went below, but was recalled by a signal by whistle before the collision, given after the fog horn of the schooner was reported, and he returned to the bridge and took charge of the movements of the vessel before the collision. The lookout forward in the second mate's watch had been relieved by the new lookout before the fog horn was reported, but they were both forward, close to the stem, up to the time of the collision. There was, also, a man stationed as lookout just forward of the bridge, on the deck. He was on his station when the fog horn was reported and remained on duty till after the collision. There had been one man at the wheel, and the wheelsman of the mate's watch had come into the wheelhouse before the collision, and both had hold of the wheel and handled it in executing the orders given after the report of the fog horn. The engineer was at his post. There were two other men on deck who were called as witnesses.

The first and chief fault imputed to the steamer is that she was running at an excessive rate of speed. The answer alleges that "when the fog set in, two hours previously, the rate of speed of the steamer was slowed down to about six

Leonard et al. v. Whitwill.

knots an hour, and so continued till the fog horn of the schooner was heard, and when the steamer's company heard the fog horn of the schooner her engines were immediately slowed and stopped and reversed at full speed, and when she collided with the schooner her speed had become so reduced that she had but a very slight forward motion and had almost stopped." The libel does not charge any particular speed but "great" speed, "dangerous and excessive speed in said fog." The answer gives an erroneous impression as to the course of events on the steamer after the hearing of the fog horn. It seems to imply, or might be taken to mean, that the orders to slow, to stop and to reverse, followed each other in immediate succession upon the hearing of the fog horn. It is very evident, however, upon the steamer's proofs, that this was not so; that the order to slow was first given, and afterwards, at an interval of time not exactly fixed, the other orders to stop and reverse at full speed were given in immediate succession.

(The court here set forth at length the evidence as to the speed of the steamer, and then proceeded as follows:)

The actual speed of the steamer must therefore be taken to be upwards of seven knots an hour through the fog. To determine whether this exceeded that "moderate" speed, which the laws of England and the United States alike prescribe as the speed of a steamer during a fog, requires a consideration of the circumstances under which she was proceeding, and especially the density of the fog, and the place where she was sailing as respects her liability to fall in with other vessels.

(After setting forth the evidence given by the witnesses from the two vessels as to the density of the fog, and the time and distance at which each was seen from the other, the court proceeded as follows:)

There is here, apparently, a serious conflict of evidence as to the character and density of the fog. Making all due allowances for misjudgment as to time and distance, it is still evident from the concurring testimony of those on the schooner that, at the time the steamer's whistle was heard, the schooner was not in a very dense fog, and that the steamer's lights were seen from the schooner much further off than would be deemed possible from the testimony of those on the steamer. I think the testimony shows clearly that at no time before the collision did the port light of the schooner come within sight of those on the steamer. This not only appears from the fact that although so many men were looking out for the purpose of discovering the vessel on the starboard bow, yet they did not see this light, but also from the proved relative courses and positions of the two vessels. The testimony of those on the steamer on this point is rendered very probable, notwithstanding the estimate of those on the schooner as to the bearing of the steamer when first seen as nearly abeam, and possibly so little aft of abeam as to have brought the port light within range. This is their judgment only, about which they may easily have been mistaken. The light which the lookouts on the steamer saw when the schooner was close on to them may have been, upon the proofs, the binnacle light, which is shown to have been on the weather side of the compass and inside the house. There is no reason to believe that this would become visible to any one on the forward deck of the steamer till they could look down on the deck of the schooner. In considering this apparent conflict of testimony, therefore, it must be remembered that up to about the time of the collision it had been very thick, and that while those on the schooner had the lights of the steamer within range of their vision to aid their judgment just at that time as to the den-

Leonard et al. v. Whitwill.

sity of the fog, those on the steamer had no such assistance to aid their observation. It appears, also, from the testimony, to be probable that just at that time the fog was clearing up rapidly to windward, and the schooner being all the time to windward of the steamer, it was clearing about her more rapidly than about the steamer. The witnesses of the schooner had already observed that it was clearing up before they heard the steamer's whistle. But so far as those in charge of the steamer were concerned, they had not observed this, even if immediately about the steamer the fog had become any less dense. The place in which the steamer was sailing was a part of the ocean constantly traversed by vessels bound in and out of New York and coastwise.

Under these circumstances I have no hesitation in holding that the speed of the steamer, as proved, or even that admitted in the answer, was much in excess of a "moderate speed." The prudence or imprudence of those navigating her is to be judged by what they knew or observed as to the density of the fog and not by what possibly they might have known or observed, if in consequence of seeing lights in the direction of the schooner they might have had more exact means of observation. For an hour and a half they had been running through a dense fog in a much frequented highway of commerce at a speed exceeding seven knots, and when they heard the fog horn of the schooner they were still doing the same thing, without the fog having cleared at all, so far as they could see. They were liable at any moment to fall in with other vessels, either bound out of New York or coastwise northward, in which case, as the wind was, they were likely to cross the bows of the steamer as this schooner did, or bound inward before the wind, in which case they might come in a nearly opposite direction to her course. The master of the schooner was, by his own reckoning, about

sixty-five miles east of Sandy Hook, instead of about 51 as shown by the log of the steamer. I do not perceive that it makes any difference as regards the prudence of the steamer's speed which is right. In either place the speed was excessive and dangerous, and the steamer was not under such control that she could be stopped in time to prevent a collision with such vessels as she might expect to meet. The case is not to be judged by the fact that as it was she nearly stopped in time to avoid this vessel. It was the good luck of the steamer and not the result of her prudence that the schooner was not much nearer when first discovered, and that she was going upon a course which involved little risk to the steamer from the collision. The case is to be judged on this point, not by what did happen, but by what might reasonably have been expected to happen. (*The Pennsylvania*, 19 Wall. 125. See also *The Eleonora*, 17 Blatch. 88.)

I think, also, that the steamer was in fault for not immediately stopping upon hearing the fog horn a little off her starboard bow. The order given by the mate was "half speed." At the same time he gave the order to put the wheel hard-a-starboard. This order to starboard seems to have been proper. It turned the vessel's head away from the direction in which the other vessel was. It tended to reduce the chances of collision. But in the absence of all knowledge as to the direction in which the other vessel was moving, and especially considering that the steamer was already running at a dangerous rate of speed, it was manifestly the duty of her officer in command to reduce that excessive rate in the quickest possible time. Even if he was justified in holding her at some speed, the least compatible with the control of her movements, he was bound to reduce her to that limit at once. This he did not do. Having given these orders he signalled the captain to return to the bridge,

Leonard *et al.* v. Whitwill.

and told him the situation. The captain instantly gave the orders to stop and reverse at full speed, but it was already too late. She was not quite stopped before reaching the schooner. Although the interval between the orders by the mate and those given by the captain was very short, it undoubtedly, on the testimony, was long enough to make such a difference in the distance traversed by her that, if the order to stop and reverse had been given at once, she would not have struck the schooner. But without regard to that fact, which could only be known by the event, the situation at the time the horn was heard called for an instant and most rapid possible reduction of her immoderate speed. This the captain seems to have realized when he reached the bridge. He did then what the mate should have done before.

It remains to consider whether the schooner is also in fault. The fault charged is that she did not show a torch-light to the approaching steamer. It is admitted that she did not show a torch, but it is insisted that she was under no obligation to do so, so far as this steamer was concerned, because the steamer was a foreign vessel, to which the navigation laws of the United States do not apply and on which they are not binding. And it is further contended, that if she had shown a torch there was nothing that the steamer could have done after she could have seen it to have avoided the collision already made inevitable by her own imprudence. By an Act of Congress, passed in 1871, it was enacted that "every such" [*i. e.*, sailing] "vessel shall, on the approach of every steamer during the night time, show a lighted torch upon that point or quarter to which such steamer shall be approaching. And every such vessel that shall be navigated without complying with the terms of said Act of April 29, 1864, and the provisions of this section, shall forfeit and pay the sum of two hundred dollars," etc. It is

Leonard *et al.* v. Whitwill.

claimed on the part of the libellants that the law which governs the case of a collision between an American and a foreign vessel is the general maritime law, or "those rules of navigation which usually prevail among nations navigating the seas where the collision takes place;" that a foreign vessel cannot attribute as a fault against an American vessel the violation of an Act of Congress unless the requirement of that law has become a part of the general maritime law or rule of the sea, which it is insisted is not the case in respect to this statute regulation. So far as appears by evidence in this case, no other maritime nation has made this regulation, as to showing a torch-light, a part of its positive statutory regulations for preventing collisions. The rule of law here invoked on the schooner's behalf, is undoubtedly the rule of the English court in respect to their own navigation laws. It was first applied by the Court of Admiralty, and has received the assent of the Privy Council. (*The Dumfries*, Swabey, 63; *The Zollverein*, Id. 96; *The Chancellor*, 4 L. T. (N. S.) 627; *The Saxonia*, 1 Lush. 410.) In the case of *The Belle*, 1 Benedict, 317, Judge Shipman, in this court, upon the authority of the first three of these cases, directly applied the same principle in exoneration of a British vessel sued here by the owners of an American vessel, with which she was in collision, refusing to find it as an act of negligence against the British vessel that she had failed to comply with the positive requirement of the British statute in respect to lights; that requirement not being then a part of the maritime law generally nor enacted by our Congress. It is to be observed, however, that in that case the judge expressly found that "there was no proof whatever, that the failure to carry the colored lights prescribed by the British Act, misled the Belle or in any way contributed to produce the disaster." In the case of *The Scotia* in this court, these

Leonard *et al.* v. Whitwill.

English cases were approved. The question was whether the Scotia being sued here by the owners of the Berkshire, an American vessel, could impute it as a fault to the Berkshire that she had failed to comply with the Act of Congress prescribing the lights to be carried by American vessels. The collision was attributable to the Berkshire's carrying no colored side lights and showing a white light, at such a height that the Scotia mistook her for a steamer, at much greater distance off than she really was. The case was decided by the District Court in favor of the Scotia, on the ground that the establishment of the same regulations as to lights by a very large number of maritime nations, including Great Britain and the United States, showed that this regulation as to lights had become part of the general maritime law in force in that part of the sea where the collision occurred. (1 *Blatch*. 309-328.) The case was appealed and the circuit judge, while concurring in the decision, on the ground that whether the Berkshire was bound to observe these rules or not, she was alone at fault and the Scotia was not at fault, distinctly disapproved of the rule of the English cases cited above, on the ground that these regulations for preventing collisions and for the security of life and property, were designed to be observed at all times and in all places by American vessels; that they were designed for the benefit of all mankind in securing the greater safety of life and property at sea; that at any rate they were designed to secure greater safety of life and property on our own vessels, and that therefore public policy requires that they should be always enforced in our own courts. (Id. 342-345.) The case then went to the Supreme Court and the decisions below were affirmed. Mr. Justice Strong, in delivering the opinion of the court, while he seems to put the decision of the case on the ground that in any view of this question the merits

were wholly with the Scotia, yet, as it seems to me, strongly disapproves the rule established by the English cases cited above. He says: "We rest this conclusion, not solely or mainly upon the ground that the navigation laws of the United States control the conduct of foreign vessels, or that they have as such any extraterritorial authority except over American shipping. Doubtless they are municipal regulations, yet binding upon American vessels, either in American waters or upon the high seas." "We concede, also, that whether an act is tortious or not, must generally be determined by the laws of the place where the act was committed. But every American vessel, outside of the jurisdiction of a foreign power, is for some purposes, at least, a part of the American territory, and our laws are the rules for its guidance. Equally true is it that a British vessel is controlled by British rules of navigation. If it were that the rules of the two nations conflicted, which would the British vessel and which would the American be bound to obey? Undoubtedly the rule prescribed by the government to which it belonged. And if in consequence collision should ensue between an American and a British vessel, shall the latter be condemned in an American Court of Admiralty? If so, then our law is given an extra-territorial effect and is held obligatory upon British ships not within our jurisdiction. Or might an American vessel be faulted in a British Court of Admiralty for having done what our statute required? Then Britain is truly, not only the mistress of the seas, but of all who traverse the great waters. It is difficult to see how a ship can be condemned for doing that which, by the laws of its origin or ownership, it was required to do, or how, on the other hand, it can secure an advantage by violation of those laws unless it is beyond their domain upon the high seas. But our navigation laws were intended to secure the safety

Leonard *et al.* v. Whitwill.

of life and property as well as the convenience of commerce. They are not in terms confined to the regulation of shipping in our own waters. They attempt to govern a business that is conducted on every sea. If they do not reach the conduct of mariners in its relation to the ships and people of other nations, they are at least designed for the security of the lives and property of our own people. For that purpose they are as useful and necessary on the ocean as they are upon inland waters. How, then, can our courts ignore them in any case? Why should it ever be held that what is a wrong when done to an American citizen is right if the injured party be an Englishman?" In this state of the authorities I do not think that the English cases cited or the former decisions in this court, both of which, it will be observed, were rested partly on other and independent grounds, are in any way controlling. And I do not perceive, that the cases cited by the libellants, with regard to the construction put upon the English Act limiting the liability of ship owners, have any pertinency to this question. They proceed simply on the ground that that Act by its terms is to be construed as intended to be limited to British ships. This appears very plainly in the opinion of Vice-Chancellor Wood in *Cope v. Doherty*, 4 K. and J. 367. The cases of *The Dumfries*, *The Zollverein* and *The Saxonia*, proceed not on the principle that a British ship on the high seas is in general absolved from its obligation towards its own government and her subjects to obey the British navigation laws but upon the ground that this is a duty *only* to her own government and its subjects, and not to foreigners; that the laws were not passed for the benefit of foreigners and are not binding on them, and that it is inequitable to enforce the rules against a British ship in favor of a foreign ship, because if the case were reversed and the foreign ship had committed the same

Leonard *et al.* v. Whitwill.

fault, not being a fault by the general maritime law, the British ship could not avail herself of it as a fault against the foreign ship; that this would be to put the British vessel to a disadvantage in her own courts. It is not to be forgotten that the ground of liability in this class of cases is negligence. If a given act is in violation of a positive regulation of statute law, obligatory upon the party, it is, as a general rule, conclusively negligent, and if it may have contributed to the injury the burden is thereby thrown on the guilty party to prove that it did not so contribute to the injury. This is the American as well as the English rule. (*The Pennsylvania*, 19 Wall. 137.) Now, whatever may be the decision ultimately reached in such cases as *The Scotia*, where the prescribed act omitted was the observance of a mere artificial mode of signalling to other vessels the character of a vessel or her position and course, by an arbitrary arrangement of certain prescribed lights, it seems to me that the failure of an American vessel to comply with the requirement of the Act of 1871, in reference to showing a torch, must be held to be an act of negligence on her part, whether the other vessel is domestic or foreign. That statute seems especially designed to protect our own sailing vessels and to save life and property thereon. It is true that a steamer approaching a sailing vessel under circumstances to which the statute applies will be in some danger, and it may well be, and probably is, true, that her protection, whether foreign or domestic, was also within the purview of the Act; but it needs no argument to show that the relative positions of the two vessels must generally be of very unequal peril, greatly to the disadvantage of the sailing vessel. The object of the torch is to give the steamer such information as to the position and course of the sailing vessel that she may not run her down. It seems especially, if not solely, applicable to

the case of a sailing vessel approached from astern or on the quarter where her own lights cannot be seen, and to the case of a vessel, in danger of being thus run down by a steamer. Not only is it apparently designed chiefly for the safety of the sailing vessel but the thing required to be done is not the giving of a mere artificial or arbitrary signal, but is simply such a precaution as prudence might in the absence of any regulation suggest, and such a signal as any steamer would understand, whether aware of the regulation or not. Congress can declare what shall be considered negligence in the mode of navigating an American ship under given circumstances, and this is what I think has been done by this statute. Considering the obvious purpose designed to be accomplished by the Act, I have no doubt it was intended to be observed by all American vessels everywhere, approached in the night time in the manner described by any steamer, whether domestic or foreign. The peril in either case is the same and the precaution prescribed would be equally effective. I think the case may be distinguished from the case of arbitrary or artificial signals. As to those there is more reason to say that they are inapplicable between ships of different nations, where they have not become part of the language of the sea. They are of doubtful utility unless understood and used by both parties.

I think, therefore, I am bound to hold as an act of negligence the omission of the schooner to comply with the Act of 1871 by showing a torch, and it is unnecessary to decide whether, independently of the statute, it would have been required of this schooner by the general maritime law, as contended by the claimant. Under some circumstances the general maritime law does require a vessel to show other lights besides the regulation lights. (See especially *The Anglo-Indian*, 3 Asp. M. C. 1; *The Earl Spencer*, Id. 4.)

It is urged that the rule does not apply in foggy weather; that other regulations are especially made for foggy weather. It is a sufficient answer to say, that according to the state of things observable to those in charge of the schooner, lights could be seen a considerable distance, certainly further than objects lying low in the water like the schooner's hull, or even her sails. And I see no reason for excepting foggy weather, be the fog ever so dense. The rules must be complied with. Fogs may break away suddenly, as we see by this instance.

But it is still a question whether the steamer could have taken any precaution after she could have seen the torch for avoiding the schooner. It is impossible to determine that she could not have done so. The schooner was struck about forty feet from the stern. The steamer was, from the time the fog horn was heard, under a hard-a-starboard wheel. Under this wheel her head began to fall off to port. According to the testimony of the second mate it fell off a point and a half before the captain gave the order to stop and reverse full speed. The effect of backing, even with a hard-a-starboard wheel, was to throw her head the other way. If her wheel had been seasonably thrown to port upon discovering by a torch-light which way the schooner was going, this movement to starboard would have been accelerated so long as she had any headway. The question whether there would have been time for this manœuvre, depends partly on the question how far off those on the steamer could have seen a torch-light, and partly on the question how much the porting at that time would have changed the steamer's heading to starboard. Unfortunately for the schooner, the elements for determining these two questions are very uncertain and mostly speculative, and her violation of a positive rule, obligatory on her, makes it incumbent on her to pro-

Leonard et al. v. Whitwill.

duce such evidence as will determine these points with at least reasonable certainty in her favor. I think she has not done so. There was certainly a considerable time before the collision that the lights of the steamer were plainly visible from the schooner. There was time enough for considerable running about, horn-blowing and shouting in the vain endeavor to make those on board the steamer change their course. While it cannot be assumed that a torch-light on the schooner could have been seen on the steamer as soon as the green light of the steamer was seen on the schooner, yet if it had been seen after that time it is still quite possible upon the evidence that the steamer could have reversed her wheel in time to have gone under the stern of the schooner, and the question how far a torch-light could have been seen, must be determined chiefly from the testimony of those on the schooner, since they alone of all the witnesses had any opportunity to form any judgment on that point.

It is claimed that the schooner was negligent in not blowing her horn loud enough or often enough. It is argued that the act of the mate in snatching the horn from the lookout and blowing it himself, shows that he was not satisfied with the way it had been blown. I do not think this is a proper inference from the testimony. It is a singular fact in the case that but one blast of the horn was heard on the steamer, but the evidence is sufficient to prove that it was blown at proper intervals and several times just before the collision.

The result is, that both vessels were in fault, and the libellants will have a decree for half their damages and costs, and a reference to compute the amount of their damages.

An application was subsequently made by the libellants to modify the decree so as to decree that the libellants should recover the full value of the cargo and of the seamen's effects.

CHOATE, J. It has been determined in this case that both vessels were in fault. The suit is *in personam* by the owners of the schooner sunk by the collision, against the owner of the steamer. The answer, while alleging the fault on the part of the schooner, which has been found by the court, did not claim any rebate on account of the damage done by the collision to the steamer. It appears, however, by the testimony that the steamer sustained at least slight damage. A question now arises as to the form of the interlocutory decree to be entered. The libellants insist that there should be a decree for half the value of the schooner and the full value of her cargo and of the seamen's effects. It is argued that the steamer is liable to the innocent owner of cargo for its whole value; that as to that part of libellants' claim the libellants sue merely as agents or trustees; that the schooner, being totally lost by the collision, her owners are not, under the statute limiting the liability of ship owners, liable to the owners of the cargo for any part of this damage; that, therefore, the steamer must pay it in full. And the same argument is applied to the claim for the seamen's effects. It is insisted on behalf of the respondent that the loss should be apportioned, and that out of the recovery for the value of their vessel the libellants should pay to the owners of their cargo and to the seamen half of the loss sustained by them. The libellants offer to have the owners of cargo brought in, if necessary, as parties, and the respondent asks leave to amend his answer so as to have the benefit

Leonard *et al.* v. Whitwill.

of an apportionment in accordance with his right upon the facts proved.

The principle of apportionment, as I understand it, requires, where there is fault on both sides, that *the loss or damage caused by the collision* should be borne equally by the two parties. Damage done to cargo in *either vessel* is a part of that loss or damage, and it is wholly immaterial in which vessel the damaged cargo happens to be. It is very true that the owner of the cargo may sue and recover its value from both or either. (*The Atlas*, 93 U. S. 302.) And the owners of the schooner have an undoubted right to sue on behalf of the owners of the cargo for its value. It would seem that so suing their rights as bailees must be as great as if the owners of cargo joined as libellants. No final decree should, therefore, it seems, be made which will give the libellants a smaller amount as bailees than the owners of the cargo would be entitled to receive. And I think the same may be said as to the seamen.

But the fact that the suit is *in personam* ought not to make any difference as to the apportionment of the damage caused by the collision, including the value of any property lost or damaged. And, as between the owners of the two vessels, each must bear his half of the entire loss and damage. Therefore, as between the owners of the two vessels, the owners of the schooner must bear half the loss of the cargo. This is not enforcing a personal liability of the owners of this schooner beyond her value. It is simply apportioning between them and the owner of the steamer the damage caused by the collision and charging them with half of it and the owner of the steamer with half of it. The principle is the same as if the damaged cargo had been on board the steamer. In that case could the owners of the schooner say, we would not be personally liable for this loss

Leonard *et al.* v. Whitwill.

because of the statute, therefore there shall be no rebate on this account. If they could say this, they could make the same plea as to the damage to the steamer herself, and so the principle of apportionment would be wholly set aside if one of the vessels is lost. Any other mode of adjusting the damage would not be an equal apportionment of the damage, which is to be regarded as a unit for this purpose, whatever may be the parts of which it is composed. The decree in the case of *The Eleonora*, 17 Blatch. 105, seems to have been entered in conformity with this view. The question of the effect of the statute limiting the liability of ship owners, cannot arise unless it shall appear that by such apportionment the libellants will not recover enough to reimburse the owners of cargo on whose behalf they sue. It seems to be unnecessary to make the owners of the cargo parties if that could be now done. They are virtually before the court through the libellants. The amendment asked for by the respondent, setting forth the damage to the steamer, is one that will conform the pleadings to the facts proved. It should therefore be allowed. The decree will be that the damage be apportioned and all questions as to what adjustments may be necessary in consequence of what may be shown as to the respective amounts of damage to cargo and other interests will be reserved till the coming in of the commissioner's report. And the point here decided on this motion may be reconsidered upon application for a final decree, if cause shall be shown for a rehearing.

Decree accordingly.

For libellants, *Henry M. Scudder* and *George A. Black*.

For respondent, *R. D. Benedict* and *James Thomson*.

The Schooner Lucia B. Ives.

DECEMBER, 1879.

THE SCHOONER LUCIA B. IVES.

LIEN.—DOMESTIC VESSEL.—ADVANCES.—NECESSARIES.—CHARTER.—COSTS.

F. filed a libel against a vessel owned in the State of New York, to enforce a lien claimed to exist under the law of the State of New York, passed April 24, 1862. It appeared that F., as a broker, had negotiated a charter of the vessel for her owners, who resided at Sag Harbor, for a term of six months; that the charterer, who acted as master of her, applied to F. to know where he should get stores for the vessel and F. obtained from C. an order on L. for the stores, which were furnished to the master on that order. It appeared further that F. also procured \$215 of U. on a pledge of bills of lading and paid it to the master to disburse the vessel. The voyage was broken up so that the security failed and F. claimed that he owed C. the money. It appeared, also, that he advanced to the master \$20 for labor in getting the vessel moved from Jersey Flats to Brooklyn, and \$49 paid on request of the owners for wages of seamen on a previous voyage, and \$25 for obtaining a bond for the vessel when under arrest, which bond was not accepted, and \$25 for fees paid at the custom house. And he claimed \$41 for commissions in negotiating the charter:

Held, That it did not appear that the libellant furnished the stores or advanced the money necessary to procure them;

That it was not sufficiently proved that the \$215 was advanced for the purpose of "procuring necessities" for the vessel, and, besides, it was advanced, not by the libellant, but by C.;

That there was no lien on the vessel under the statute for the amount advanced for custom house fees, or for the sum paid to procure a bond, or for the commissions, they not being included in the term "necessaries";

That for the amount paid for moving the vessel the libellant had a lien, and also for the sum advanced to pay off the seamen, although by the terms of the charter, the charterer had agreed to pay all expenses of the vessel;

That as the principal part of the claim was disallowed, the libellant should not have costs.

The case of *The John Farron* (14 Blatch. p. 29) distinguished.

The Schooner Lucia B. Ives.

CHOATE, J. This is a libel filed by A. G. Fisher to enforce an alleged lien for supplies furnished and money advanced in this port for procuring necessities for the schooner Lucia B. Ives of Sag Harbor. The lien is claimed under the statute of New York, passed April 24, 1862. The claim consists of three parts: (1), for ship chandler's stores sent on board by one John H. Lewis, but in fact supplied, as is alleged, by the libellant; (2), for money advanced to the master to be expended by him in necessities, \$215; (3), for money at different times advanced by the libellant to the master for specific necessities, about \$150. The statute referred to provides that "whenever a debt amounting to \$50 or upwards, as to a sea-going or ocean-bound vessel, or amounting to \$15 or upwards as to any other vessel, shall be contracted by the master, owner, charterer, builder or consignee of any ship or vessel, or the agent of either of them within this State for either of the following purposes, * * 2d, for such provisions and stores furnished within this State as may be fit and proper for the use of such vessel at the time when the same were furnished, * * * 4th, on account of loading or unloading, or for advances made for the purposes of procuring necessities for such ship or vessel, or for the insurance thereof; * * * such debt shall be a lien upon such vessel, * * and shall be preferred to all other liens thereon except mariners' wages."

1. As to the stores furnished by Lewis, the libellant's testimony is that he was the broker who negotiated a charter of the vessel for the owners, who reside at Sag Harbor to one John Burns for the term of six months; that after the charter was effected, and while the vessel was in the possession of the charterer, who also acted as master, the libellant, acted as agent for him and the master made up a list of the

The Schooner Lucia B. Ives.

stores needed for the vessel and asked the libellant where he should get them; that the libellant procured from one Crowell, his father-in-law, an order for the master upon Lewis to furnish these stores; that they were furnished on this order. Thus it appears that Lewis furnished the stores to the master, either partly or solely on the personal credit of Crowell. Crowell, though in court upon the trial, was not called as a witness. I do not think it can be fairly claimed that the libellant either furnished the stores or advanced the money for the purpose of procuring them. Whether Lewis or Crowell may have a lien under the statute is not now in question, but either of them, it seems, would, upon the evidence, have a better claim to be the party within the benefit of the statute than this libellant. The libellant says, indeed, that he owes Crowell the amount. This may be and yet he may not be within the statute; moreover, it appears that the libellant made no charge to the vessel or any person for these goods.

2. The \$215 was procured of Crowell by the libellant upon the pledge of the freight bills or bills of lading for cargo shipped on the vessel for New Orleans. The libellant testifies that he paid it to the master to disburse the ship. This is all the proof there is that it was advanced, if advanced by him at all, for the purpose of "procuring necessaries." I think this evidence is wholly insufficient to prove this fact. Many things might be included in "disbursing the ship" which could not be considered "the procuring of necessaries," upon the most liberal interpretation of those words. Aside from this difficulty, I think it is entirely clear from the testimony that it was Crowell and not the libellant who advanced the money. The security taken has failed by the breaking up of the voyage, and the libellant claims that he owes Crowell the amount as money borrowed, but the evi-

The Schooner Lucia B. Ives.

dence, especially considering the fact that Crowell is not called as a witness, shows a direct advance by Crowell to the master on the pledge of the freight.

3. The claim for \$150 advanced consists of several parts, \$20 for labor in getting the vessel moved from Jersey Flats to Brooklyn, \$49 paid by order of the owners for wages upon a previous voyage, \$25 for obtaining bondsmen to release the vessel when under arrest, the bond, however, not being accepted, \$25 for fees paid at the custom house, but what these fees were was not shown, and the remainder, about \$41 for the libellant's commission as broker and agent in negotiating the charter, procuring freight, etc. It is conceded that the first item of \$20 is properly to be treated as necessities within the statute. The amounts paid to a person for procuring bondsmen to release the vessel, which bond he did procure but which was not accepted, and also the amount paid for custom house fees, seem not to be within the meaning of the term "necessaries" as here used. The word, taken in connection with the other parts of the statute, seems to refer to something supplied to the ship, as materials, labor, provisions, stores, use of a place to lie in, etc. These are the things for which those furnishing them have a lien, and I see no reason for believing that the legislature intended to give a larger lien to one advancing money than to one directly dealing with the vessel. That all possible expenses of the owners for and on account of the vessel were not intended to be included in this provision for a lien for advances, seems to follow from the circumstance that the statute adds "or for the insurance thereof." It is noticeable that the statute gives no lien for wages, probably upon the theory that they are already satisfactorily provided for by the maritime law. The circumstances under which the \$49 was advanced were that the former crew of the vessel refused to

The Schooner Lucia B. Ives.

leave her until they were paid, and they threatened to libel her, and thereupon the libellant, at the written request of the owners, paid the master this money and with it he paid off the crew. On the whole, it seems to me that money advanced for wages is to be considered advanced for "necessaries" within the meaning of this Act. That labor furnished in various forms has the benefit of the lien, is evident. The reason for omitting this particular form of labor and in not giving a lien for wages to the seamen themselves, is also evident. The omission of such provision is therefore no strong argument against including wages in the word "necessaries" in the provision in favor of the party advancing money. The item for commissions clearly was not advanced at all. As to the two items of \$20 and \$49, which are to be regarded as necessities, I think it appears that the libellant advanced them. It is admitted, indeed, that he procured the money from Crowell, but there is no sufficient evidence, as in case of the \$215, that they were direct advances by Crowell to the master, although the libellant left the master's receipts with Crowell when he got the money.

It is objected, however, that the libellant had knowledge of the charter by the terms of which the charterer stipulated to pay all the expenses of the vessel during the period of the charter, and the case of *The John Farron*, 14 Blatch. 29, is relied on to support this objection. The point was not decided in that case, but the learned judge intimates his opinion that knowledge of the terms of the charter would have defeated that claim. The agreement in the charter in that case was that the repairs to be made should not be a lien on the boat. In the present case, the agreement was that the charterer would pay all the expenses in question except the \$49 for wages above referred to, and required the charterer to give security for the fulfilment of this agreement; and

The Schooner Lucia B. Ives.

such security was given. While the knowledge of this charter was a circumstance to be considered on the question whether credit was given to the vessel or to the charterer, I think it did not preclude the libellant from acquiring a lien under the State statute. In the case of *The John Farron*, it might have been a fraud upon the owner to aid the charterer to impose the lien at all, because he agreed not to do it; but it was not in itself a fraud in this case, because the creation of the lien is not inconsistent with an intention on the part of the charterer to clear off all such incumbrances, and this is all that he agreed to do and for which he gave the security. He did not agree to pay everything in cash. In the case of *The City of New York*, 3 Blatch. 188, Mr. Justice Nelson expressed the opinion that upon a charter similar to this a person supplying the vessel in a foreign port would have a maritime lien, although he knew of the charter. And I think the libellant's right, under the statute, is at least as great.

The owners were not proved, as claimed by the libellant, to have agreed, upon taking back the vessel, to pay all these bills, but only to discharge all valid liens. It was therefore open to them to deny that these were valid liens.

The defence of collusion between the libellant and the charterer to defraud the owners is not sustained.

As the principal part of the claim is disallowed, I think the libellant should not have costs.

Decree for libellant for \$69.

For libellant, *L. S. Gove*.

For claimants, *W. W. Goodrich*.

YORK.

GAS.

page.

take on board a cargo of
n. Conn., as a stipulated
able to pay the damages.
to ascertain the damage,
estimated net freight which
the voyage in question
detained for repairs five
removed by her owner in her

to recover the whole of the
one-third of it.

and a decree for his
the same as amount-
of \$5380, the esti-
that would have earned
Middletown, Conn.,
suffering by the collision.
Port Johnson, there to
agreed to carry at a
repairs five days and
by the libellant
ably or not does not
al voyage would have

of this case, I think
excessive. What the

The Steam-tug Gorgas.

libellant is entitled to is indemnity for the loss of the use of his boat for five days. This evidence shows that the use of the boat for fifteen days was worth \$53.80, and no further evidence was offered on either side as to the value of such use of the boat. In some cases of total loss the net freight for the voyage entered upon has been allowed. This is, perhaps, an established exception to the doctrine that speculative or contingent profits are not allowed as damages. (*The Heroine*, 1 Ben. 226; *The Galatea*, 6 Ben. 259.) The rule in case of detention is to allow what the vessel would earn for the owner on hire during the period of detention. (*Williamson v. Barrett*, 13 How. 111.) If she has been chartered for a voyage, the probable length of which is substantially coincident with the time required for repairs, then the freight reserved, deducting the cost of earning it, may be taken as a measure of what the owner has lost by the detention. As pointed out in the case last cited, if a longer period is required for the repairs than the probable length of such voyage, then such net freight obviously falls short of an adequate allowance, (By Nelson J., Id. p. 111.) It is equally plain that if the time required for the repairs is far short of the probable length of such voyage, then the net freight would be an excessive allowance, for the reason that the vessel could not earn so much during the period of detention. At the end of five days the owner resumed the use of her and therefore no question arises as to subsequent want of employment being attributable to the collision, if in any case such subsequent loss of employment could be made the ground of recovery. The libellant having, after that time, actually used the boat in her usual employment, I think it must be presumed in the absence of evidence, if that point is material, that for such employment he received an equivalent consideration—in other words, what the use of her was

The Bark Edward Albro.

fairly worth. If he did not, the matter was wholly within his own knowledge and it was for him to show the fact. The case of *Williamson v. Barrett*, as I understand it, does not make the net freight the absolute measure of the amount recovered for detention without regard to the length of the detention. One-third only of the sum of \$53.80 should be allowed for demurrage.

The other exceptions are not well taken.

Claimant's 2d exception sustained, 1st and 3d overruled. Libellant's exceptions overruled and decree for amount reported, deducting \$35.87.

For libellant, *L. S. Gove*.

For claimant, *F. A. Wilcox*.

DECEMBER, 1879.

THE BARK EDWARD ALBRO.

BOTTOMRY.—FORM OF BOND.—ITEMS PROPERLY INCLUDED IN A BOTTOMRY BOND GIVEN BY THE MASTER OF A VESSEL TO HER AGENT.—COMMUNICATION WITH OWNER.—COSTS.—PLEADING.

A bark belonging in Nova Scotia arrived in Cape Town with a cargo of deals. Her owner had sent a power of attorney to a merchant there, but he refused to act. Her master becoming acquainted with one G., a ship chandler, and having told him that he was to have several hundred pounds in hand from

The Bark Edward Albro.

the inward freight, procured supplies of him for the vessel and advised with him about procuring a cargo to New York. G. procured some freight for the vessel and also arranged for the purchase of some old iron to be taken as freight. But when the inward freight was settled up, it appeared that there was but £37 coming to the captain and that he would not have money enough to pay her bills for supplies and for some repairs which were necessary. The seller of the old iron arrested the captain to recover the price, whereupon G. paid the bill and obtained his release. The next day the captain suddenly died. G. then advertised for a master and one R. offered his services and was accepted and took command of the vessel. G. had been credibly informed that the mate was not a proper man to take the command. Advertisements were then issued for a loan of money on bottomry, but none were offered, and G., who had himself a large bill for supplies, paid the other bills of the vessel and took an instrument signed by R. as master, as a bottomry bond, and also bills of exchange for £687 16s 11d, on B. of New York (who was the equitable owner of her), payable at seven days' sight. The vessel having arrived in New York and the bills of exchange not being paid, G. libelled her to recover the amount of the bond. The registered owner appeared as claimant and contested the bond:

Held, That it is essential to a bottomry bond that payment of the sum secured be conditioned on the safe arrival of the vessel;

That while the question, whether this characteristic is to be found in the instrument, must be determined by the terms of the instrument without regard to extrinsic evidence, it is sufficient if on the whole instrument the intention of the lender to take the risk appears;

That this instrument was a bottomry bond, because, although there was a provision in it that in case the bills of exchange were not accepted and paid, the bond should become due, yet there was also in it a condition that G. should assume the risk of the voyage, and the two conditions must be taken together;

That, although the libel did not allege that the master had made efforts without success to procure advances on the credit of the vessel, yet as it averred that he, having no other means of procuring the money, borrowed the money on bottomry after duly and publicly advertising therefor, and the libel had not been excepted to, the objection to the libel for not containing that allegation had been waived;

That it is more proper pleading, if the claimant of a vessel object because the master of his vessel failed to communicate with him before taking up money on bottomry, that he should aver by way of defence that the circumstances were such as to require such communication;

The Bark Edward Albro.

- That under the circumstances of this case the bond was not made void by the failure to communicate with the owner;
- That although the libellant had acted incautiously in advancing his money to pay some charges, which were not proper to be inserted in a bottomry bond, there was no ground for charging him with bad faith;
- That a party who has supplied a vessel, or advanced money on the personal credit of the owner, cannot afterwards turn it into a maritime lien on the vessel by taking a bottomry bond for it, but advances made and supplies furnished on the credit of the vessel may be turned into a subsequent bottomry;
- That though no agreement was made with G. at the time he began to supply the ship, as to how he was to be paid, he undoubtedly supposed from the master's statement which was untrue, that the master would have funds to pay him, and the owner could not now take advantage of such misstatement, and the supplies furnished by G., while the effect of that statement continued, were properly included in the bond;
- That the following items were not proper to have been included in the bond, viz.: (1), The amount paid for the old iron and the costs of the suit. (2), Money furnished to the master but not proved to have been used for the ship or loaned for the ship's use. (3), Items for personal expenses of the master, for cab hire and for liquors. (4), Commissions on the libellant's own bill of supplies. (5), Cash for a set of scales, weights and measures, not shown to be necessary for the ship. (6), Items of luxuries in the libellant's bill of supplies;
- That the following items were properly included: (1), Commissions for procuring freight. (2), Stevedore's bill for taking cargo on board. (3), Funeral expenses of the former master. (4), Advertising for a master, for bottomry and for bills against the ship. (5), For drawing the bottomry bond and stamps on it. (6), For a butcher's bill, the items of which were not given but which were shown to be correct. (7), Expenses of survey and cost of repairs;
- That, owing to the libellant's having included in the bond unauthorized charges, and insisted on its payment in full, and filed his libel without affording the owner of the vessel a reasonable time to examine into the question of the amount really due, the court would not award him costs.

CHOATE, J. This is a suit by Joseph Grady, upon a bottomry bond executed at Cape Town, South Africa, by the master of the British bark Edward Albro, on the 10th day of

The Bark Edward Albro.

July, 1877, for £687 16s 11d. The bond is upon the vessel and her freight for the voyage from Cape Town to New York. Soon after her arrival in this port and on the 14th of September, 1877, this libel was filed. The bark belongs to Pictou, Nova Scotia, but her equitable or real owner is a resident of New York. The vessel being attached on process, the registered owner appeared as claimant and has answered. Besides some defences on the merits, the claimant makes by exception and answer certain objections to the libel and to the bond, which will be first disposed of.

It is objected that the instrument sued on is not a bottomry bond but a mortgage. Undoubtedly, this court has no jurisdiction to enforce a mortgage, and if such is the real nature of this instrument the libel must be dismissed. (*Bogert v. The John Jay*, 17 How. 402; *The Brig Atlantic*, Newb. 516; *The Emancipation*, 1 Wm. Rob. 124.) The distinguishing characteristic of a bottomry bond is that the payment of the sum secured thereby is conditioned upon the safe arrival of the vessel, the lender taking all the risk of her loss upon the voyage, and this is the consideration that justifies the extraordinary or maritime interest reserved on such contracts. (Same cases, also *The Atlas*, 2 Hagg. 57.) And whether or not an instrument is a mortgage or a bottomry bond must be determined, as in case of all other written instruments, by the terms of the agreement itself, without regard to extrinsic proof of the intention of the parties. (Cases last cited.) It is enough, however, that upon the entire instrument the intention of the parties appears that the lender shall take the risk of the safe arrival of the vessel. There is no prescribed form of a bottomry bond and the Courts of Admiralty, recognizing the fact that the forms of these instruments used in different countries differ, have given to them a liberal construction to effect the intention of

The Bark Edward Albro.

the parties. *The Nelson*, 1 Hagg. 176. See also *Stronach v. Hodgson*, 3 B. and Ad. 50; *The Tartar*, 1 Hagg. 14. So, too, it is no objection to a bottomry bond that a draft or bill of exchange is also given for the amount. It is in some countries usual for the master to draw for the amount, and the drawing of such a bill as collateral security does not vitiate the bond. *The Nelson*, *ut supra*; *The Jane*, 1 Dodson 466; *The Emancipation*, *ut supra*.

Applying these well-settled rules to the present case, the instrument here sued on is undoubtedly a bottomry bond. It commences as follows: "Know all men by these presents, that I, William Reimer, master of the barque or vessel called the Edward Albro, of the burden of 394 tons or thereabouts, now lying in Table Bay, am held and firmly bound unto and on behalf of Joseph Grady, of Cape Town, merchant, etc., carrying on business under the style of Jos. Grady & Company, in the penal sum of nine hundred pounds sterling of lawful money, to be paid to the said Joseph Grady & Company, their certain attorney, order or endorser of this bond, for which payment to be well and truly made I, the said William Reimer, do hereby specially bind, mortgage, pledge and hypothecate the said ship, Edward Albro, her tackle, apparel, furniture, and appurtenances, together with the freight to become due and payable in respect of the cargo laden on board during the voyage of the said vessel from this port bound to New York, firmly by these presents. Sealed with my seal, dated at Cape Town," etc. The bond then recites that the vessel, on her voyage from Geffle to Cape Town, met with very severe and boisterous weather and sustained considerable damage, and was compelled in consequence to expend a considerable sum of money in repairs and necessary supplies to enable her to leave Cape Town and continue her voyage to New York, the port of her

The Bark Edward Albro.

owners; that the master, not having sufficient funds for defraying the expenses of repairs, stores and supplies and other necessary expenses at that port, advertised for tenders for the sum required "on bottomry of the said vessel, cargo and freight;" that Joseph Grady & Co. agreed to advance the sum required on more satisfactory terms than any tender put in; that the master had received from them the full amount of £687 16s 11d, to defray the expenses of the ship, and enable her to proceed to sea, "on bottomry of the said ship, her tackle, apparel, furniture and appurtenances, together with the freight to become due and payable, during the hereinafter mentioned voyage in respect thereof." The bond then contains the following clause: "In consideration whereof, the usual risks of the seas, enemies, pirates, utter loss from fire and all other casualties of navigation, are to be for and on account and risk of the said Joseph Grady and Company." The bond then further recites that the master has signed and delivered a set of bills of exchange for the sum of £687 16s 11d, dated at Cape Town the 9th day of July, 1877, drawn and signed by him upon A. Speirs Brown, of New York (the equitable owner of the vessel), payable at seven days after sight to the order of Jos. Grady & Co. It then concludes as follows: "Now the condition of this bond is such, that if the said bills of exchange or any one of them shall be well and truly accepted upon presentation and paid within seven days thereafter, then this obligation shall be null and void and of no force or effect, but otherwise shall be and remain in full force and virtue, I, the said William Reimer, for and on behalf of myself and the owners, hereby contracting, agreeing and engaging that the said ship, her tackle, apparel and furniture and appurtenances, and the freight as aforesaid, shall, in the event of such non-payment, at all times be liable and chargeable for the payment of this

The Bark Edward Albro.

bond, together with maritime interest at the rate of twenty-five pounds per centum per annum, and all costs and charges which may attend the recovery thereof, and that the taking of such bills of exchange (if not paid) shall not in any way vitiate or prejudice this bond. In witness whereof," etc., etc. The bill of exchange referred to in the bond was in the following form: "At seven days after sight of this first bill of exchange, etc., pay to the order of Joseph Grady & Co. the sum of £687 16s 11d, value received, in advances to defray expenses of the barque Edward Albro, secured by bottomry bond, to be surrendered on due payment of this draft, on or within seven days after presentation, and which charge, with or without advice, to account of Wm. Reimer, master." Little need be said, it seems to me, about the form of the bond. As the use of the word "bottomry" in an instrument will not make it a bottomry bond, if the evident intention is to make the agreement to pay absolute and not dependent on the safe arrival of the vessel, so the use of the word "mortgage," as in this instrument, cannot have the effect to make it a mortgage instead of a bottomry, if upon view of all its provisions the contrary intent is apparent. Reading the formal condition alone, it might seem that the only case in which the bond was to fail was the non-acceptance or non-payment of the draft; but if effect is given to all its provisions, it is obvious that this is not so. The express provision that Joseph Grady & Co. are to assume all the usual risks of the seas, etc., was evidently inserted for the very purpose of attaching to the contract the condition of the safe arrival of the ship, and this provision cannot be ignored. This clause and the condition can, without difficulty, be construed together. If the draft is paid, the bond is discharged; if not, the bond is to be enforced. But what bond? Why, of course, not the absolute promise to pay, but the

The Bark Edward Albro.

bond as it is, with all its conditions and qualifications, one of which is that the obligee takes all the usual risks of the seas, and of the loss of the ship upon the voyage by fire or other casualty. The exceptions to the libel, therefore, so far as they are based on the theory that this was not a bottomry bond, are disallowed.

A further exception is taken that the rate of interest reserved was usurious. This objection necessarily falls with the other. An exception is also taken that it does not appear on the libel that the master made any efforts to procure advances on the credit of the owner, or that he communicated with the owner that such advances were needed and that he had made efforts without success to procure the same on the credit of the vessel before the execution of the bond. The libel does allege the need of funds and that the master "having no other means of procuring the same, after duly and publicly advertising therefor, borrowed the aforesaid sum of the libellant on bottomry," etc. Correct pleading requires that the material facts should be stated, not by way of recital merely, but positively, and if this exception had been brought on before the trial of the cause, it would be proper to have sustained it, in order to compel the libellant to state the fact that there were no other means within the control of the master positively; but by going to trial on the merits, it seems to me that the claimant has waived this merely technical objection, and if he has not, that the libel should now be allowed to be amended to conform the pleadings to the facts, without imposing any terms. I think a distinct and positive averment that the master had no other means of procuring the money except by bottomry, is a sufficient averment of the necessity for giving the bond, and that the libellant need not allege that the master communicated with the owner. Whether the master is bound

The Bark Edward Albro.

to communicate with the owners, or not, before executing a bottomry bond, depends upon circumstances, and it seems more proper, if the claimant insists that the circumstances require it, that this should be set up by way of defence. (*The Olivier*, Lush. 484.) In the first instance, it is enough for the libellant to allege the necessity for repairs and supplies, and that the master was without means of procuring them. (*The Eureka*, 2 Low. 420.) The exceptions to the libel are therefore overruled.

Upon the merits, several defences are attempted which may be reduced to these: (1), that the bond is void because of fraud on the part of the libellant; (2), that it is void for want of a communication with the owner; (3), that the master had other means to meet all the proper expenses of the ship; (4), that, as to some part of the expenses included in the bond, they were not incurred on the credit of the vessel, and as to some that they are exorbitant.

As to the defence of fraud, there is, I think, no sufficient evidence to impeach the good faith of the libellant. He has indeed acted very incautiously in advancing his money to pay some charges which are clearly improper to be included in a bottomry bond, but his acts show a want of prudence and of knowledge of the business he undertook to transact, rather than bad faith. And the fact that a part of the expenses, for which a bottomry bond is given, are improper is not in itself a fraud. (*The Augusta*, 1 Dods. 287.)

In respect to the defence of want of communication with the owner, it is necessary to consider the circumstances under which the bond was given. The master, as agent of the owner of the ship, is bound to act with a prudent regard to the owner's interests, and before hypothecating the ship, where other means of raising the necessary funds fail, he is bound to communicate with the owners, if such communica-

The Bark Edward Albro.

tion is practicable under the circumstances, without unduly delaying the ship, before he can execute a bottomry bond. (*The Oriental*, 7 Moore's P. C. 398; see also *The Bonaparte*, 8 Id. 459; *The Onward*, L. R. 4 Ad. and Ec. 57; *The Julia Blake*, 16 Blatch. 472.) It has been suggested that this objection goes only to invalidating the stipulation of the bond for payment of maritime interest on the ground that the failure to communicate has only subjected the owner to this extraordinary expense. (*The Eureka*, 2 Low. 418.) But, as I understand the cases, it has been held that the communication with the owner, where practicable and prudent under the circumstances, is one of the modes of obtaining funds to which the master must resort and which he is bound to exhaust before that necessity can be said to exist which clothes him with authority as agent of the owner of the ship to make an express hypothecation of the ship by a bottomry bond. This being so, the objection, if well taken in the particular case, must make the contract as a bond invalid for want of authority to execute it. The same principle has been held to apply to a bond hypothecating the cargo, and in respect to the cargo upon a ground which does not apply to the case of the ship, namely, that the owner of the cargo may have the opportunity to exercise his option to take the cargo at the intermediate port upon payment of full freight and indemnifying the ship against expense and loss arising from his retaking it. (*The Julia Blake*, *ut supra*; *The Onward*, *ut supra*; *The Lizzie*, L. R. 2 Ad. & Ec. 250.) But it is entirely clear as to the cargo and *a fortiori* as to the ship, that the master is not bound to wait to communicate with the owner, if it is impracticable under the circumstances, or will seriously delay the vessel, having regard to all the circumstances. Perhaps no better test can be applied than this, that in the matter of communicating the master must do what a prudent owner, if

The Bark Edward Albro.

personally present, would do under the same circumstances. (*The Lizzie, ut supra.*) The failure of the bond for want of communication would not, however, necessarily lead to the dismissal of the libel, since the court may, if it appears that through a mistake and without fraud, an attempt to convert a tacit hypothecation under the general maritime law into an express hypothecation by the bond has failed, allow an amendment of the pleadings and enforce the maritime lien. And such practice would especially be proper where the parties, without fault, have, as in this case, been delayed two years in the trial of their case, and have really tried the questions that arise in respect to the maritime lien. (*The William and Emmeline*, B. and H. 20; *The Eureka, ut supra*; *Currington v. Pratt*, 18 How. 66.) Of course this would be impossible if the prior claim did not constitute a maritime lien, as in the case of *The Circassian*, 3 Ben. 414, or in case of an attempted hypothecation of the cargo, where no prior lien exists.

The barque arrived at Cape Town on the 15th of April, in command of Capt. Cummings, who had sailed in her from New York. She had sailed from New York with a cargo of petroleum for Stettin. From Stettin she proceeded to Geffle and from Geffle took a cargo of deals for Cape Town. She put into Madeira in distress and was there repaired, and incurred expense, for which a bottomry bond was executed. She was consigned at Cape Town to one Ardeme. The owner had, before her arrival, sent a power of attorney to a merchant at Cape Town, to attend to the business of the vessel, but for some reason he did not act. Soon after his arrival Capt. Cummings got acquainted with this libellant, Joseph Grady, who was doing business under the name of Joseph Grady & Co., as a ship chandler, and Grady solicited of the captain the business of the ship so far as related to the supplying of

The Bark Edward Albro.

ship-chandler's stores. The captain informed Grady that he would have coming from his consignees three or four hundred pounds to spare, which he wished to put into old iron to bring to New York, and asked him to assist in procuring other freight. The vessel seems to have had no business at Cape Town except to deliver her inward cargo and to get such homeward cargo as she could obtain. Soon after his arrival, the master consulted with the libellant in respect to getting a homeward cargo, and by his advice, the ship was advertised in the newspapers for New York, for any freight that might offer. The libellant was then doing business with an American man-of-war, and secured for the barque the carriage of her guns to New York, the freight agreed upon being £100. Cargo did not offer in any large quantity, but some wool and other produce was secured. The libellant arranged with one Wainwright to sell to the master about two or three hundred tons of old iron and about twenty tons were actually delivered and shipped on the barque. This was soon after the delivery of her inward cargo, which took about ten days. But afterwards, upon settlement of the master's accounts with Ardeme & Co., it was discovered that instead of there being three or four hundred pounds to spare of his freight moneys to invest in cargo, as the master had represented, there was but £37 payable to him. The precise time when this discovery was made does not appear. It was, however, before the 29th of May, when the master died. Up to that time most of the cargo that was obtained at all had been shipped and there was little prospect of any more. From the time that the discovery was made that the master had but £37 at his command, it became evident that he would be in want of funds to disburse the ship in order to prosecute his voyage, unless the freight on the cargo shipped and to be shipped should be sufficient and available there-

The Bark Edward Albro.

for. The owner had no agent acting for him and no funds in Cape Town at the master's command. The vessel, on her arrival, needed some slight repairs and supplies and stores for her stay in port and her return voyage, which was ordinarily a voyage of about two months. The apparent necessities of the ship were much short of the amount afterwards secured by the bottomry, £687, for, as will be shown hereafter, many expenses were included therein which were not really necessities of the ship, and after the death of the captain there was a further unexpected delay of the vessel in port, and repairs which had not been anticipated, but which were rendered necessary in consequence of the refusal of the crew to go to sea in the vessel as she was, and the consequent order by a survey of some additional repairs. All this tended to make the ship's disbursements, in fact, larger than seemed probable before the death of Captain Cummings, and before the bills of the vessel were called in by advertisement, which was some time, but how long does not appear, before his death. When the bills were called in it was evident that the master could not obtain the means at Cape Town of disbursing the ship. It is suggested that the freight, in all amounting to about £300, was a fund that he could have used. Upon the evidence, however, I am bound to find that it would not have been possible, at Cape Town, without some collateral security or an indorser, to raise money on the freight. Before Captain Cummings' death he had been arrested at the suit of Wainwright for the price of the old iron delivered to the ship. The libellant paid the bill and costs, amounting, in all, to about £49, and the captain was released, went on board ship and almost immediately died. He seems to have been an intemperate man and had lived on shore while in port and run up considerable bills for his board, for liquor and other unnecessary expenses. Upon the death of

The Bark Edward Albro.

the master the libellant advertised for a master, and on the 14th of June Captain Reimer offered his services, and he was accepted and assumed the command of the barque on the 16th of June. It is objected that his appointment was irregular for want of authority on the part of the libellant, and, also, because the vessel had a mate who was competent to act as master and who should have succeeded to the command. It is, indeed, suggested that the libellant designed a fraud on the owner, and for that reason set aside the claims of the mate and procured and installed a master in his own interest who would make no objection to executing the bottomry bond and would aid the libellant's fraudulent designs. As above indicated, the evidence does not sustain this charge. The mate seems to have been set aside because he was, or the libellant was credibly informed that he was, not a suitable man to become captain. In this the libellant may have been mistaken, but it cannot be concluded from such mistake that Captain Reimer, who became, in fact, the master, and who has since been recognized as such by the owner, had not all the customary authority of master from the time he took command of the vessel. Tenders for bottomry on ship and freight were advertised for, but no tenders appeared, and finally the libellant, who had already a large bill for supplies due him, paid the bills of the ship and took the bottomry bond. The vessel sailed from Cape Town on the 12th of July. No communication was had with the owner, except that on the 30th of May the libellant wrote the owner a letter, which was received in New York on the 7th of July, informing him of the death of the master, referring to the claims against the vessel and promising further information by the next mail, which would leave on the 5th of June. This letter is clearly insufficient as a communication, if communication was necessary, because it was not sufficiently

The Bark Edward Albro.

distinct as to the necessities of the ship, and by promising further advices, led the owner to await such further intelligence before acting on it, which further intelligence did not come. Captain Reimer also wrote a letter advising the owner of his appointment. The letter of the libellant also referred to the possibility of the freights being sufficient to provide for disbursing the ship without resorting to a bottomry. At that time the bills had not all been presented. The shortest line of communication between Cape Town and New York, at that time, was by mail to Madeira, which left Cape Town once a week by steamer, and from Madeira by telegraphic cable by way of Lisbon and London. By this means of communication messages have been received in New York from Cape Town in fourteen days. The shortest period, therefore, for a despatch from Cape Town and the receipt of a reply, would have been twenty-eight days, but with the chances of having to wait for the mail at Cape Town and Madeira for something less than a week at each place, the time to be allowed for a communication cannot probably be put at less than thirty-five days. Was it, under all the circumstances, necessary to wait this length of time to get an answer or funds from New York before hypothecating the ship and freight? What would a prudent owner have himself advised, if he had been placed in the same situation in which the libellant and the master were? In considering this question, I think the nature and amount of the necessities of the ship are a very important element. If the repairs required are extensive and the detention of the ship will be necessarily considerable, there are much stronger reasons for consulting the owners, than where the repairs required are trifling and the supplies needed are those ordinarily required for all vessels wherever they may be. The latter is the present case. There was no apparent reason, before

The Bark Edward Albro.

Captain Cummings died, why the ship should be detained in port twenty days. His death made some delay, but even then a delay of thirty days was not to be anticipated. The question is not to be judged by the length of time that she actually remained in port. That is conceded to have been unexpectedly prolonged, and it is insisted by the claimant that it was unnecessarily protracted. The expenses, which it was really necessary and proper to include in a bottomry bond, were mostly such as were already secured by a tacit hypothecation of the vessel under the general maritime law, and were not very large in amount with reference to the value of the vessel. Quick despatch of the ship is at all times one of the leading duties of the master and greatly for the interest of the owner. Delay itself, whatever be the object, is attended by great expense. On the whole, I think it would have been for the true interest of the owner and what any prudent owner would, if present, have advised, that the master should, on discovering the necessity therefor, have hypothecated the ship and freight by bottomry on the very easy terms of twenty-five per cent per annum offered by the libellant, and despatched the ship without waiting for intelligence from New York for thirty-five days or more. The terms offered were easy because the probable maritime interest for the expected voyage of two months would only be about four per cent. That the owner himself was annoyed by the long detention of the vessel at Cape Town is apparent from his letters to the libellant.

The objection as to the bond, so far as it covers expenses which are properly necessities supplied to the ship, that they were not furnished on the credit of the ship nor in the expectation that a bottomry bond would be given for them, is not tenable. The principle is well established that a party who has supplied a vessel or advanced money upon the per-

The Bark Edward Albro.

sonal credit of the owner cannot afterwards turn it into a maritime lien against the vessel by taking a bottomry bond for it, but advances made and supplies furnished on the credit of the vessel may be turned into a subsequent bottomry. (*The Augusta*, 1 Dods. 283; *The Hebe*, 2 Wm. Rob. 412; *The Yuba*, 4 Blatch. 352.) As to all the bills paid by the libellant for such necessities, there is no evidence to control the presumption which arises from the fact that they were furnished to the vessel in a foreign port with no apparent means on the master's part to pay them except the vessel and her freight. Nor is there any evidence that any of these parties relied on any thing except the credit of the vessel, which, by the general maritime law, they were entitled to rely upon. As to the libellant, it is true, that during the first part of the time of his supplying the vessel, he may be held to have placed some confidence in the master's statement to him that he had about £300 to £400 to invest in cargo. This plainly implied that he was in funds to disburse the ship, according to appearances at that time. When the libellant began to supply the ship, no agreement was made as to how he was to be paid. He testifies that he supplied her as he did any other vessel. It is uncertain at what time he discovered that the master was really without funds, but it may be assumed that, till this was discovered, he supposed that the master would pay him out of these funds which he represented were coming to him from the consignee of the inward cargo. This statement of the master was either a mistake or an intentional falsehood. Which it was, does not appear. It seems to me, however, that the owner cannot take advantage of this misstatement of the master made to the libellant on his behalf and as his agent, and that as to the supplies furnished while the effect of this misstatement

.

The Bark Edward Albro.

continued, they are properly included in the bond. To hold otherwise would be to encourage fraud.

The question then is one of what items included in the bond should be allowed. The item of £48 2s 6d paid to Wainwright for the price of the iron and costs of suit, is not an expense for which the master could pledge the ship without express authority. It was for purchase of cargo. The master had no apparent authority to buy it, as Wainwright and the libellant must be held to have known. It is suggested that this iron served as ballast. But there is no proof that it was needed as ballast, nor what suitable ballast, if needed, would have cost. The items of cash furnished at various times to the master, £105 12s, must be disallowed. It appears that this money was largely for the master's private use, and it is not proved to have been used for the ship or loaned for the ship's use. The item of £6 9s 6d for cash advanced by Makin, and £6 by Nolan, must be disallowed for the same reasons. The items of "cab hire," "barouche" and "phaeton," are for personal expenses of the master, and not necessary for the ship, and are disallowed, amounting to £11 6d. This is true of the amounts paid or charged for liquors, £20 12s 6d. Most of it was shown to be for the captain's personal use. None of it is proved to have been necessary for the vessel.

Commissions of an agent properly employed by the master may be included in a bottomry as a necessary part of the expense incurred for the benefit of the ship. I think there was occasion for the master to employ the libellant to get in, settle and pay the bills of the vessel. (*The Yubu, ut supra.*) Therefore the libellant's commissions may be allowed on bills properly included other than his own. But it must be held that in supplying stores and provisions at prices charged he charged all that he was entitled to therefor and I see no pro-

The Bark Edward Albro.

priety in his having a commission on his own bill. The item of £4 10s for a set of scales, weights and measures, is not shown to be necessary for the ship and should be disallowed. So the item "rent on guns," £2 15s, of which no explanation is given. Various items for luxuries in libellant's bill, "potted meats and fruit, also "postages," "knife," "currants," "empty bags," "2 bales oakum," "tobacco," "Shipley's account, £6 6s," "petty charges, £7 10s," are not proved to have been necessary and must be excluded. The stevedore's bill for taking cargo on board is properly included. The test of what may be secured in a bottomry bond is not whether the expense is one for which the creditor will have a maritime lien without any express agreement, but whether it was properly and necessarily incurred by the master in pursuance of his authority as agent of the owner for the prosecution of the voyage. (*The Yuba, ut supra.*) The funeral expenses of the master should, I think, be allowed. Where a master of a ship dies in a foreign port without means to defray his funeral expenses and the agent of the ship pays these expenses, humanity and the interests of commerce and the relation of the parties to the vessel justify the treating of the expense as a necessity of the vessel. (*The Brig George*, 1 Sumn. 150; *Winthrop v. Carlton*, 12 Mass. 4.) Advertising for a master, for tenders upon bottomry and for the bills against the ship, may be regarded as proper charges, but the expense incurred on this account was excessive. They advertised in all the newspapers in Cape Town. This was wholly unnecessary, and all these bills, except for one paper, must be disallowed. The expense of drawing the bottomry bond and stamps on the same is proper. The objection to the butcher's bill from June 1st to July 10th, £14, that the items are not given, is not well taken. Ordinarily, proper vouchers and bills of items must be furnished. Failure to

The Bark Edward Albro.

do so is a suspicious circumstance. But, in this case, the proof is that this party supplied the ship during the period in question; that there was a pass-book in which all items were entered, which the captain held. The detailed account from April 15th to June 1st is produced and the amount of the gross charge from June 1st to July 10th is not out of proportion to the amount for the earlier period. The expenses of the survey which ordered repairs, and the cost of those repairs, are proper charges. The mate has testified that the repairs were unnecessary, but I think the proof is to the contrary. Capt. Cummings's board bills on shore must, of course, be disallowed. The doctor's bills are not proved to have been necessary for the ship. It does not appear that they were for attendance upon the master in his last sickness. It does appear that he died suddenly of heart disease.

If the parties are unable to adjust the account in conformity with these views, the matter may be referred, or particular items may again be brought to the attention of the court, if questions of items have been overlooked. I think that the claimant's point that the prices charged by the libellant are exorbitant is not sustained by the proof.

While I acquit the libellant of all bad faith, yet his careless allowance, as on ship's account, of all sorts of bills, proper and improper, was inconsistent with the exact discharge of the duty he assumed towards the owner in accepting the position of agent of the vessel. The death of Capt. Cummings made it especially incumbent on him to see that the accounts of the ship were properly kept. Every such lender on bottomry, who is also the agent of the ship, must be prepared to justify the loan as to its several parts by proper vouchers and accounts. (*The Aurora*, 1 Wh. 107.) In this case not only was the libellant thus negligent of his duty to

McCarthy v. Eggers and Janssen.

the ship at Cape Town, but on the arrival of the ship here he demanded full payment of the bond and instantly sued, before the owner fairly had a reasonable opportunity to determine by examination what part of the bond was good and what part was bad. Such conduct, while not constituting bad faith, cannot but receive the disapprobation of a Court of Admiralty. It is injurious to the interests of trade, and in this case it has rendered litigation necessary to effect what it was the duty of the libellant himself to have done. Therefore, in the exercise of that discretion which is given to the court, the costs must be denied to the libellant.

Decree for libellant for amount to be adjusted under this opinion.

For libellant, *W. W. Goodrich*.

For claimant, *F. A. Wilcox*.

Eastern District of New York.

DECEMBER, 1879.

D. MCCARTHY v. EMILIA EGGERS AND JOHN JANSSEN.*

CHARTER.—REPAIRS BY OWNER *pro hac vice*.—PLEADING.—PRACTICE.—
AMENDMENT OF ANSWER.

Where a vessel was repaired in the port of New York, upon the order of D. & R., to whom she was consigned, proceeded on a voyage, and was sold abroad on a claim for bottomry, and thereafter the ship-carpenter, who did

*But see *McCarthy v. Eggers*, 1 Fed. Rep. 478.

McCarthy v. Eggers and Janssen.

the repairs in New York, brought suit against the owners, who resided in New York and Brooklyn. and they answered separately—E. setting up that the consignees, D. & R., were owners *pro hac vice* under an agreement to manage and control the vessel, receive all earnings and pay for all repairs and supplies, for a specified money consideration; and J. setting up the same agreement and also that libellant had knowledge of it:

Held, That it was not open to the defendants to dispute the authority of D. & R. to order the repairs; and having admitted their ownership and accepted the repairs in the increased value of their vessel, they are *prima facie* liable to pay therefor;

That D. & R. were not proved to be owners *pro hac vice*, and this defence set up in the answers was not established;

That while it appeared from the proofs that defendants were actually mortgagees out of possession, no such defence was set up in their answers and no question of their liability as such could therefore be considered.

At the trial, the defendant J. asked leave to amend answer and set up that he was mortgagee out of possession:

Held, That having pleaded ownership and set up an agreement only consistent with ownership, and having stood by at the trial and applied to amend only after the effort to prove charter by the other owner had failed, he cannot now be allowed to amend.

BENEDICT, J. This is an action *in personam* to recover of the defendants the value of certain repairs done by the libellant to the bark D. H. Bills, in the port of New York.

The libel avers that "at all times when these said repairs were made and the said labor and materials were furnished by the libellant, the said respondents were the owners of said bark."

The defendants answer separately.

The defendant Eggers in her answer does not deny the averment of the libel in regard to her ownership of the bark, but sets up by way of defence that prior to the doing of these repairs she had entered into an agreement with the firm of Dill & Radmann, whereby said Dill & Radmann were to take possession and assume entire control and management of said bark, receive all her earnings, select her master,

McCarthy v. Eggers and Janssen.

her voyages and her cargoes, man and equip her and pay all the expense attending the same, and also furnish and pay for all supplies or repairs required by said bark during the period of said agreement; that in consideration of the matters aforesaid, Dill & Radmann were to pay respondent certain sums of money; that thereafter said Dill & Radmann entered into and took possession of said bark under the agreement aforesaid, and were in such possession at and after the time in the libel set forth.

The defendant Janssen in his separate answer "admits that at the time mentioned in the libel he was owner of one-sixteenth of the bark," and for a separate and distinct defence sets up the same agreement set up by the defendant Eggers, but in addition avers knowledge of such agreement on the part of the libellant.

The defence thus set up by these defendants is that the vessel, at the time of these repairs, was under charter to the firm of Dill & Radmann by virtue of an agreement between that firm and the general owners of the vessel, whereby Dill & Radmann became owners *pro hac vice*, and therefore alone responsible for the repairs sued for.

The evidence establishes the following facts:

The repairs sued for were necessary. They were ordered by Radmann of the firm of Dill & Radmann. They were furnished by the libellant upon the credit of the vessel and her owners, without knowledge on his part by whom the vessel was owned. The vessel was an American vessel and the defendants resided at the time in New York and Brooklyn respectively. They were the registered owners and their respective oaths of ownership were on file in the New York Custom House, where the vessel was registered. Just previous to these repairs the vessel had come from a foreign port consigned to Dill & Radmann, and they did her business.

McCarthy v. Eggers and Janssen.

After these repairs the vessel proceeded to a foreign port and was there sold under a bottomry bond at a judicial sale. The defendants had no personal knowledge in respect to these repairs; were never consulted as to their necessity, and gave no direct authority to Dill & Radmann to cause them to be done.

These facts make out a *prima facie* case of liability on the part of the defendants.

Having in their pleadings admitted themselves to be the general owners of the vessel, the vessel having been consigned to Dill & Radmann and they permitted to do her business, it is not open to the defendants to dispute the authority of Dill & Radmann to order necessary repairs, and, besides, the defendants having accepted the repairs in the increased value of their vessel, must be presumed to have requested the repairs to be done.

The libellant is therefore entitled to a decree unless the defendants have proved the defence set up, viz: that although they were the general owners of the vessel, Dill & Radmann were owners *pro hac vice*, by virtue of a charter of the vessel to them by the general owners.

This defence the defendants have failed to establish.

An effort was made to prove the charter set forth in the answer by the testimony of the husband of the defendant Eggers, and his testimony on the direct tended to show the existence of such an agreement; but from the cross-examination of this witness as well as from the testimony of Radmann, it is plain that no such agreement was ever made, and that no such relation as is stated in the answer ever existed between Dill & Radmann and the defendants.

What the relation of the defendants to the vessel really was appears by the testimony of the witness Eggers, on his cross-examination, and the testimony of Radmann, taken sub-

ject to the libellant's objection. The defendants were mortgagees out of possession. Dill & Radmann were the owners in possession. Dill & Radmann did not hire and were not to pay for the hire of the vessel, as the answer avers, but were to pay interest on money they had borrowed, and to secure which the title of the vessel had been taken by the defendants.

Whether under such a state of facts the defendants would be liable for these repairs, cannot be considered here because no such defence is set up in the answer.

Upon the pleadings, no question as to the liability of a mortgagee out of possession is before the court, but only the question whether these defendants, one of whom expressly, and the other by implication, admits being the owner of this vessel, had chartered her to Dill & Radmann under an agreement which rendered Dill & Radmann owners *pro hac vice*, and relieved the general owners from responsibility for repairs. That question must be decided in the negative upon the evidence.

At the trial the defendant Janssen asked leave to amend his answer so as to set up the defence that he was mortgagee out of possession at the time of these repairs. That application was reserved and is now to be disposed of. No application to amend was made in behalf of the defendant Eggers.

In regard to this application of the defendant Janssen, I am of the opinion that it cannot with propriety be granted.

In the first place, this defendant, having full knowledge that he held the title to one-sixteenth of this vessel, simply by way of security for \$750 previously loaned to Dill & Radmann, has in his answer expressly averred that he was an owner of the vessel, and set up an agreement consistent with that statement and inconsistent with the statement he now desires to insert. There being no room for surprise or mis-

The Steamship Bermuda.

take, he should now be held to the position he saw fit deliberately to assume in his answer.

In the second place, he stood by at the trial while the effort was made to prove by the husband of the defendant Eggers the charter set up in his answer, and it was only after that effort had failed that he made application to conform his answer to the fact.

These are circumstances that forbid the granting of the favor sought at so late a stage of the case.

Let a decree be entered in favor of the libellant for the amount claimed in the libel, with interest and costs.

For libellant, *E. S. Hubbe*.

For defendants, *H. D. Hotchkiss* and *A. W. Hall*.

DECEMBER, 1879.

THE STEAMSHIP BERMUDA.*

COLLISION IN NORTH RIVER.—STEAMSHIP AND LIGHTER.—CROSSING COURSES.

Where a steam-lighter, bound from Hoboken, N. J., around the Battery to the East River, and a steamship, which had come round the Battery into the North River and was making for her berth at Pier 10, against the tide, came in collision, whereby the lighter was sunk, and her owner libelled the steamship, alleging various faults of navigation:

Held, That only one of the faults charged, that of porting her helm, could have interfered with an effort on the part of the lighter to avoid the steamship;

*Affirmed by the Circuit Court upon appeal, June, 1881.

The Steamship Bermuda.

That the steamship did not put her helm, but kept her course, as she was bound to do under Rule 19, and having stopped and backed when danger occurred and after her arrival, was not in fault for the collision;
 That the light of the light intended to cross the bows of the steamship, was in fault, and the light must be examined.

FINDING, J. This action is brought to recover the sum of \$10,000 being the damages arising from a collision between the steam-lighter Nichols and the steamship Bermuda in the North River, on the 7th day of December, 1878. The pleadings state that the place of the collision was a little below pier 1, that the tide was strong ebb and the wind S. W.; that the lighter was bound from Hoboken to Newtown Creek; that the steamship, when first seen by those on the lighter, was heading up the North River, and if she had kept the course she was then on or had put her helm to starboard she would have passed the lighter on her starboard hand in perfect safety; that as soon as the steamship was discovered, two signals of the lighter's whistle were sounded as a warning to the steamship that the lighter intended to pass the steamship on her starboard hand; that instead of answering the signal the steamship paid no attention thereto, but put her helm to port, and by so doing threw herself toward the course which the lighter was pursuing; that, upon receiving no response from the steamship, and immediately upon seeing her afterwards change of course, the lighter's helm was put hard-a-starboard, her engine was stopped and backed and everything was done to avoid collision. Four faults on the part of the steamship are charged, viz: that she had no proper lookout; that she paid no attention to the signal of the lighter, but instead thereof put her helm to port; that she was going at too great a rate of speed in a crowded harbor; and that she did not stop and back.

The Steamship Bermuda.

The account of the accident given by the steamship in her answer, is that the steamship having rounded the Battery at half speed, was proceeding slowly against the strong ebb-tide to her berth at pier 10 in the North River; that the steam lighter was observed on the port bow of the steamship, distant therefrom twelve or fifteen hundred feet, coming down the river on a course that involved no risk of collision; that a large double-decked barge was passing down the river between the lighter and the steamship, and in passing, shut off the lighter from the view of those on the steamship for a short time; that when the lighter again came in view, by the stern of the barge, being then about five hundred feet distant and about three points on the port bow of the steamship, she was heading almost directly for the steamship, indicating, thereby, that she had swung off her course under a starboard helm; that, although signalled from the steamship by a single blast of her whistle, to pass down on the port side of the steamship, she paid no attention thereto, but continued to swing as though under a starboard helm, taking a course crossing the bows of the steamship, whereupon, the steamship at once backed her engines at full speed, and it being impossible to get sternway in so short a distance, the port anchor was let go, but the lighter, still under a starboard helm, came down upon the bows of the steamship, and thus caused the damage complained of. Various faults are charged by the steamer upon the lighter as the cause of the collision: (1), her departure from the course she was on when first discovered by the steamship and adopting a course crossing the bows of the steamship; (2), her failure to have a proper lookout; (3), her failure to heed the signal of the steamship, but continuing in spite thereof under a starboard helm; (4), her proceeding at too great a rate of speed; (5),

The Steamship Bermuda.

her not stopping and backing; (6), not taking the necessary precautions to avoid collision with the steamship.

In regard to these pleadings it is to be remarked that the libel is vague and unsatisfactory. It gives no courses, and the facts are so stated as to leave it uncertain what rule of navigation was applicable to the respective vessels. It would seem from the libel that the vessels were on courses substantially parallel, the lighter coming down the river between the steamship and the New York shore, and that the collision was caused by a porting of the helm of the steamship, which threw her towards the course which the lighter was pursuing. But no such case is shown by the evidence. The case for which the libellant contends upon the evidence is that the two vessels were on crossing courses. "The lighter (it is said) was crossing the river, and when discovered by the steamship, had reached the intersecting point of the courses."

Assuming that the evidence will permit the libellant to claim that the lighter was upon a course crossing the course of the steamship, instead of being substantially parallel to that of the steamship and outside of her, it cannot be denied that in such case it was the duty of the lighter to keep out of the way of the steamship, inasmuch as she had the steamship upon her starboard side and was subject to sailing rule 18 (old article 14). In order to recover, therefore, upon the case as it is claimed to be by the libellant, it must appear that the lighter was prevented from avoiding the steamship by some fault committed by the steamship which rendered it impossible for the lighter to keep out of her way.

Of the faults charged in the libel against the steamship, but one, viz: that of porting her helm, could, under the circumstances claimed by the libellant, interfere with the effort of the lighter to avoid the steamship. It was no fault in the

The Steamship Bermuda.

steamship not to starboard her helm, for her duty, under such circumstances, was to keep her course, and when it became evident that the lighter would fail in her effort to cross ahead of the steamship, stop her way as much as possible. As to a porting of the helm, no witness is called who testifies that the helm of the steamship was ported. Every witness from the steamship who speaks on the subject, including the man at the wheel of the steamship, says that the helm was not ported, and there is no testimony sufficient to controvert the statement. It is quite likely that after the engine of the steamship had been reversed, the bow of the steamship swung somewhat to east, but that arose from the action of the screw and was no fault. As regards stopping, it is proved that the steamship made every effort to stop her way as soon as it became evident that the lighter was likely to fail in her effort to cross the bows of the steamship. Upon the proofs, therefore, it is impossible to hold that the collision was caused by a fault of the steamship. The fault that caused the collision was that of the lighter in attempting to cross the bows of the steamship instead of passing under her stern.

The libel must therefore be dismissed and with costs.

For libellant, *Owen & Gray*.

For claimant, *Butler, Stillman & Hubbard*.

NOTE.

Hon. ARTHUR BROWN, of New York City, was appointed by President Garfield in the recess of Congress in 1881, as Judge of the District Court for the Southern District of New York, *viz* Hon. William G. Choate resigned, and *vacant* occurred in June, 1881, under which commission he took his seat. The nomination of Judge Brown was renewed by President Arthur, and confirmed by the Senate; and the second commission having been issued, Judge Brown was again sworn in before Hon. Samuel Blatchford, Judge of the District Court on October 28, 1881.

INDEX.

A

ABANDONMENT.

See LIMITATION OF LIABILITY, 2.

ACCOUNT STATED.

See CHARTER, 5.

ACTION.

See PRACTICE, 1.

ADVANCES.

See LIEN, 4.

AGENT.

See BILL OF LADING, 1.
LIEN, 4.

ARREST.

Judgment having been recovered against the defendant under U. S. Rev. Stat. §§ 2864 and 2839, for the value of goods illegally imported, and an execution against his property having been returned unsatisfied, and an execution against the person having been issued, on motion to set aside the latter execution:

Held, That the question whether defendant was liable to arrest on execution is by U. S. Rev. Stat. § 990 made dependent on the law of New York;

That, under the law of New York (Code §§ 1489, 548 and 549), defendant was not liable to arrest;

That the action was not one to recover damages for a fraud, nor for a penalty within the meaning of N. Y. Code, § 549. *The U. S. v. Moller*,
189

ASSIGNMENT AND ASSIGNEE.

See BANKRUPTCY, 1, 4, 5.

ATTACHMENT.

See PRACTICE, 3, 5.
STIPULATION, 3.

B

BANKRUPTCY.

1. Creditors of a firm, composed of five persons, filed a petition in bankruptcy against the firm. On the return day certain other creditors appeared and moved for leave to intervene and contest the adjudication, on the ground that the assignment was void, being executed by only three of the five partners personally, and in the firm name by one partner, signing as attorney in fact, but, as the moving creditors alleged, not having any power of attorney from the firm authorizing him to execute the assignment:

Held, That, as it was not alleged that the other partners did not consent to the assignment, the motion must be denied, for the making of the assignment with their consent would be an act of bankruptcy, even though the execution of the assignment were defective;

That the levies of execution by the creditors applying to intervene after the filing of the petition gave them no greater right to intervene than creditors at large have. *Lawrence's Case*,
4

2. A creditor of a bankrupt opposed his discharge, on the ground that he had made a conveyance of real estate to his wife, with intent to hinder, delay and defraud creditors,

and introduced, as evidence, the record of a decree in a suit in a State court, between such creditor, as plaintiff, and defendants, of whom the bankrupt was one, declaring such conveyance void, as against the plaintiff, as made with intent to hinder, delay and defraud creditors:

Held, That such decree was not conclusive, as an adjudication between the same parties, establishing the fraudulent character of the conveyance;

The conveyance was held by the court, on the facts, to have been made with intent to make a provision for his wife, in fraud of his creditors. *Sumner's Case*, 34

3. B. proved a claim against a bankrupt. Before the bankruptcy proceedings were commenced, the bankrupt had sued B. for a debt, and B. had set up said claim in defence, as a distinct cause of action against the bankrupt. The suit was tried after the adjudication of bankruptcy, and, on the trial, B. offered no evidence in support of such defence, and the bankrupt had judgment against B. The assignee in bankruptcy was not a party to the suit. He set up the judgment as an estoppel against the proving of the claim by B.

Held, That it was not an estoppel. *Matter of The People's Safe Deposit and Storage Institution*, 38

4. A. made a voluntary assignment of all his property to his creditors. After that an execution was issued on the property assigned. Subsequently a petition in bankruptcy was filed against A. Thereafter the court adjudged A. bankrupt, and appointed an assignee. The assignee then filed a bill in equity against the execution creditor to set aside the execution, and to compel the creditor to account to him for the property taken under their execution.

in his favor. The assignee in bankruptcy had, in a suit against C., set aside the assignment from B. to C., as being in violation of the bankrupt law. The sheriff then applied to the bankruptcy court to pay him, on the execution, the proceeds of the sale:

Held, That the assignee in bankruptcy derived his title through C., and was estopped by the judgment; that the lien of the execution was valid, and that the sheriff was entitled to be paid the proceeds of the sale to the extent of the lien. *Beisenthal and Henschel's Case*, 42

5. On the 28th of June, 1875, the firm of W. & Co. made a voluntary assignment to L. Thereafter K. & Co., H. W. & Co., L. & Co. and C. & Co. obtained judgments against W. & Co. and issued executions, under which the sheriff levied on the goods formerly belonging to W. & Co. and then in the possession of L. as assignee. L. notified the sheriff of his claim and the sheriff called on the execution creditors for indemnity, which each of them gave, and the sheriff proceeded to sell the goods. Before the sale, C. & Co. notified the sheriff that they withdrew the indemnity which they had given and that he must proceed only by virtue of the direction endorsed on their execution. The sheriff sold the property for \$2606, which he applied on the executions of K. & Co. and L. & Co. and returned the others unsatisfied. Thereafter, on the 3d of September, 1875, proceedings in bankruptcy were commenced against W. & Co. by other creditors, the act of bankruptcy alleged being the making of the voluntary assignment to L. They being adjudged bankrupts and an assignee having been appointed, he filed a bill in equity against L. and against the execution creditors to set aside the assignment to L. and to compel the execution creditors to account to him for the property taken under their executions.

Held, That the title of the assignee in bankruptcy related back to the

time of the making of the voluntary assignment, and that the intervening levies of the judgment creditors were therefore cut off;

That the sheriff and the judgment creditors, except C. & Co., must account for the property taken under their executions;

That as to C. & Co. the bill must be dismissed, because the sale was not their act;

That L., having done all that he was bound to do to protect the property, was not liable to account for the property sold on execution.

Held, also, that as the evidence proved only that the assignment was void under the bankrupt law, the assignee was not estopped to deny that it was absolutely void under the law of New York, by the fact that it was averred in the creditor's petition to have been made with intent "to hinder and defraud creditors," especially as the petition averred also as an act of bankruptcy, that it was made in contemplation of insolvency and to defeat the bankrupt law, and the adjudication may have been decreed under this last averment.

It seems that the averments of the creditor's petition as to the act of bankruptcy are not conclusive on the assignee. *Lindon v. Lewis*, 49

See COSTS, 1.

BILL OF PARTICULARS.

BILL OF DISCOVERY.

See PRODUCTION OF BOOKS AND PAPERS, 2, 3.

BILL OF LADING.

1. V., the master and owner of a canal-boat at Oswego, employed F. & Co. to procure for him a cargo, and F. & Co. arranged with H. R. & Co., the proprietors of an elevator, to give the boat a load of grain for New York. F. & Co. gave V. an order on H. R. & Co., for the grain and he went to the elevator and loaded his boat. F. & Co. then made out a bill of lading in two parts, which were signed by

V. and by F. & Co., each keeping one part. It consigned the cargo to W. in New York, and authorized him to detain the boat at the rate of \$3.00 a day for thirty days, and thereafter at the rate of \$2.00 a day till the first of April, and from that time demurrage was to be allowed at the rate of 2½ per cent per day on the freight. After V. had left with his boat F. & Co. received from H. R. & Co. blank forms of bills of lading, which differed from the others as to the rate of demurrage after the 1st of April. F. & Co. filled up and signed these bills, naming H. R. & Co. as shippers, and sent them to H. R. & Co. and they forwarded one of them to W., to whom they consigned the grain. W. never received the bill of lading which V. had signed and delivered to F. & Co., because they had sent it to S., to whom they had made the freight and demurrage payable, as security for advances made by them to V. The boat not having been discharged till April 16th, V. filed a libel against W. to recover demurrage from April 1st, according to his bill of lading. The difference between the two bills of lading was accidental:

Held, That the first bill of lading must be held to be the contract between the parties, and that W. should have been put on inquiry as to the contract, from the fact that his bill of lading did not purport to be signed by the master or by any one authorized to bind the boat;

That V. was entitled to recover the demurrage claimed. *Vandover v. Wilmot*, 223

2. A piece of marble statuary was shipped at Leghorn on board a bark, packed in a wooden case, to be carried to New York. It had been packed at Carrara, and brought to Leghorn in a lighter. A bill of lading was given for it by the bark, acknowledging the receipt of the case in good order, "measurement and contents unknown," and excepting perils of the seas. On the discharge of the case at New York,

it was externally, in good condition, but a rattling was heard in it, and on opening it the statuery was found to be broken, and the bark was held for the damage. The case was proved to have been well stowed. The bark met with heavy weather on the passage:

Hus v. Kempf, the burden was on the plaintiff to show that the statuery was in good condition when it was delivered to the bark; and that in the absence of such proof, and on the fact of great stowage of the case and of perils of the seas, the vessel was liable for the damage. *The Vincenzo T.*, 228

3. The master of a vessel filed a libel against the consignee of 97 casks of wine, for non-payment of freight for bringing them from Rotterdam to New York. The consignee set up in defence that seven of the casks were broken by reason of bad stowage, and that the others to a greater value than the freight lost; and he also set up a tender of performance of an agreement to settle the claim for the rate of the bill of freight without interest. It appeared that the wine was ordered by the consignee at Newcastle, in England, to be shipped by first steamer. They sent it to Rotterdam, where it was to be shipped, and the brokers shipped it by the steamer of which the libellant was master, and took a bill of lading which excepted inefficiency of stowage, leakage, breakage and loss by the sea. There was proof of great stowage of the casks and that the vessel met with heavy weather during which a noise was heard below, and in the hatches below deck several of the casks were found broken. The respondent admitted that the master could not see to the freight in his own person.

That in the answer admitted that the case was made with reference to the stipulations to his knowledge and belief. The respondent was employed by the consignee to load the respondent to the vessel stipulations

limiting the carrier's liability, and the bill of lading was the usual form used by that line of steamers:

That, on the evidence, the breakage of the casks was due to perils of the sea or imperfection of the packages:

That there was no proof of an accord and satisfaction which would have discharged the claim for freight;

That the tender, made after suit brought, could not avail the respondent, as it did not include interest and costs, and the money had not been deposited in court, as required by the rules of the court:

That the libellant was entitled to a decree for the amount of the freight. *Hus v. Kempf*, 231

4. On a bill of lading stipulating that the freight shall be paid in New York, "at the current rate of exchange for banker's sight bills on London," the amount of the freight being expressed in English money, the amount payable is not to be calculated in gold, but in currency at the current rate for bills on London:

And to this is to be added interest at the New York rate from the time when the freight is payable. *Hus v. Kempf*, 364

5. The bill of lading of a cargo of coal shipped on a canal-boat contained the following clause: "In case the consignee discharges cargo or any part thereof, he is to charge the master not to exceed twelve and a half cents per ton for the same, and to have four full working days after due notice of the arrival of the boat at the dock of the consignee." It also provided for \$10 a day demurrage thereafter. The boat arrived at the dock of the consignee and was reported. Other boats were waiting to be discharged by the consignee. The master was told that he might discharge his cargo, for which he was assigned dock-room, but he was also told that, if he wished the consignee to discharge his boat, he must wait his turn. He waited and was discharged in seven days from his re-

porting. He was then paid his freight and gave a receipt in full of all demands. Thereafter he filed a libel against the consignee to recover three days' demurrage:

Held, That the discharge by the consignee was, on the evidence, an accommodation to the master and not an exercise of the right to discharge under the bill of lading, and that the consignee was not liable. *Tuttle v. The Albany and Rens. I. and S. Co.*, 449

See DAMAGE TO CARGO, 2.

BILL OF PARTICULARS.

The United States brought suit for an unpaid balance of income tax, alleged to be due from the defendant during a period of ten years. Among other defences, it was denied that the defendant's taxable income exceeded the sums on which he had paid the tax. The defendant moved for a bill of particulars, making affidavit that "he, in good faith, intends to defend the action, and that he is ignorant of the particulars of the claim made against him, and that it is necessary and material to his defence that he shall have rendered to him a bill of the particulars thereof, as he is advised by his counsel and verily believes," and the district attorney made affidavit that "it is not in his power and to the best of his knowledge and belief, not in the power of the plaintiff, to state all the items or particulars which have to be considered in determining what defendant's taxable income was:"

Held, That the case was not a proper one in which to order a bill of particulars;

The granting or refusing a bill of particulars is a matter in the discretion of the court under the circumstances of the particular case;

In general, such a bill is not ordered where the matters of which information is thus sought are peculiarly within the knowledge of the defendant or more within the defendant's than the plaintiff's knowledge, or where, from the nature of the

case, the plaintiff cannot be reasonably expected to be able to give the items of his claim with certainty.

Whether a delay from April, 1878, when the demurrer to some parts of the answer was finally disposed of, till September, 1879, when this motion was made, would be fatal to the application for a bill of particulars, if defendant were otherwise entitled to it, or whether such application should be denied because at an intervening term of the court the defendant's counsel had announced that they were ready and desirous to go to trial, *quære*. *The U. S. v. Tilden*, 547

BOND.

See PRACTICE, 3, 4.
SAFE RETURN.

BROKER.

See BILL OF LADING, 3.
LIEN, 4.

BOTTOMRY.

A bark belonging in Nova Scotia arrived in Cape Town with a cargo of deals. Her owner had sent a power of attorney to a merchant there, but he refused to act. Her master becoming acquainted with one G., a ship chandler, and having told him that he was to have several hundred pounds in hand from the inward freight, procured supplies of him for the vessel and advised with him about procuring a cargo to New York. G. procured some freight for the vessel and also arranged for the purchase of some old iron to be taken as freight. But when the inward freight was settled up, it appeared that there was but £37 coming to the captain and that he would not have money enough to pay her bills for supplies and for some repairs which were necessary. The seller of the old iron arrested the captain to recover the price, whereupon G. paid the bill and obtained his release. The next day the captain suddenly died. G. then advertised for a master and

one R. offered his services and was accepted and took command of the vessel. G. had been credibly informed that the mate was not a proper man to take the command. Advertisements were then issued for a loan of money on bottomry, but none were offered, and G., who had himself a large bill for supplies, paid the other bills of the vessel and took an instrument signed by R. as master, as a bottomry bond, and also bills of exchange for £687 16s 11d, on B. of New York (who was the equitable owner of her), payable at seven days' sight. The vessel having arrived in New York and the bills of exchange not being paid, G. libelled her to recover the amount of the bond. The registered owner appeared as claimant and contested the bond:

Held. That it is essential to a bottomry bond that payment of the sum secured be conditioned, on the safe arrival of the vessel:

That while the question, whether this characteristic is to be found in the instrument, must be determined by the terms of the instrument without regard to extrinsic evidence, it is sufficient, if on the whole instrument, the intention of the lender to take the risk appears:

That this instrument was a bottomry bond, because, although there was a provision in it that in case the bills of exchange were not accepted and paid, the bond should become due, yet there was also in it a condition that G. should assume the risk of the voyage, and the two conditions must be taken together:

That, although the libel did not allege that the master had made efforts without success to procure advances on the credit of the vessel, yet as it averred that he, having no other means of procuring the money, borrowed the money on bottomry after duly and publicly advertising therefor, and the libel had not been excepted to, the objection to the libel for not containing that allegation had been waived:

That it is more proper pleading, if the claimant of a vessel object because the master of his vessel failed

to communicate with him before taking up money on bottomry, that he should aver by way of defence that the circumstances were such as to require such communication;

That under the circumstances of this case the bond was not made void by the failure to communicate with the owner;

That although the libellant had acted incautiously in advancing his money to pay some charges, which were not proper to be inserted in a bottomry bond, there was no ground for charging him with bad faith;

That a party who has supplied a vessel, or advanced money on the personal credit of the owner, cannot afterwards turn it into a maritime lien on the vessel by taking a bottomry bond for it, but advances made and supplies furnished on the credit of the vessel may be turned into a subsequent bottomry;

That though no agreement was made with G. at the time he began to supply the ship, as to how he was to be paid, he undoubtedly supposed from the master's statement, which was untrue, that the master would have funds to pay him, and the owner could not now take advantage of such mis-statement, and the supplies furnished by G., while the effect of that statement continued, were properly included in the bond;

That the following items were not proper to have been included in the bond, viz: (1). The amount paid for the old iron and the costs of the suit. (2). Money furnished to the master but not proved to have been used for the ship or loaned for the ship's use. (3). Items for personal expenses of the master, for cab hire and for liquors. (4). Commissions on the libellant's own bill of supplies. (5). Cash for a set of scales, weights and measures, not shown to be necessary for the ship. (6). Items of luxuries in the libellant's bill of supplies;

That the following items were properly included: (1). Commissions for procuring freight. (2). Stevedore's bill for taking cargo on board. (3). Funeral expenses of the former

master. (4), Advertising for a master, for bottomry and for bills against the ship. (5), For drawing the bottomry bond and stamps on it. (6), For a butcher's bill, the items of which were not given but which were shown to be correct. (7), Expenses of survey and cost of repairs;

That, owing to the libellant's having included in the bond unauthorized charges, and insisted on its payment in full, and filed his libel without affording the owner of the vessel a reasonable time to examine into the question of the amount really due, the court would not award him costs. *The Edward Albro*, 668

C

CASES COMMENTED ON.

The Com. Ex. Bank's Case	15
N. B. R. 43 (Mellor's case).....	59
Vandewater v. Mills, 19 Howard	90
(The James McMahon).....	106
The Gen. Sheridan, 2 Benedict	
294 (The James McMahon)....	104
The Seneca, 18 Am. Jur. 786 (The	
Annie H. Smith).....	111
The Virginia Rulon, 13 Blatch-	
ford 519 (The City of Hart-	
ford).....	154
Ex parte McNiel, 13 Wallace	242
(The Kalmar).....	244
Woodruff v. Com. Ins. Co 2 Hil-	
ton 130 (Neidlinger v. Ins. Co.)	258
Cory v. Boylston Ins. Co. 9 Am.	
R. 14 (Neidlinger v. Ins. Co.)	260
Norwich Co. vs. Wright, 13 Wal-	
lace 104 (The John Bramall)	505
The Benares, 7 Notes of Cases	
Suppl. 50 (The Orient).....	621
The Linda Flor, Swabey	309
(The Orient).....	622
The Belle, 1 Benedict 317 (Leon-	
ard vs. Whitwell).....	649
The Scotia 1 Blatchford	309
(Leonard vs. Whitwell).....	650-3
The John Farron, 14 Blatchford	
29 (The Lucia B. Ives).....	665

CERTIORARI.

See HABEAS CORPUS.

CHARTER.

1. Where a vessel is to have "dispatch for discharging," the time to be allowed is measured by the capacity of the vessel to deliver the cargo.

Under a charter containing such a clause a vessel arrived at Havana with a cargo of paving stones, which, by the rules of the port, were to be discharged at the mole. Her master reported to the consignees on April 4, but, by reason of its being Passion Week and the crowded state of the mole, she was not brought up to the mole till April 14, when she was moored bows on, and the stones discharged on a staging. The master could have discharged the cargo over the side of his vessel in five days, but, in consequence of discharging over the bow and of custom house regulations as to discharging, the vessel was not discharged till April 24th. The master of the vessel claimed demurrage and that some errors in the vessel's account should be corrected, which was refused by the consignees, and the vessel remained in port pending this dispute till May 3d;

Held, That the vessel was not entitled to demurrage after the discharge was completed ;

That the vessel was entitled to demurrage for all the time after she was reported till she was discharged, less five days ;

That the vessel was not chargeable with the expense of the staging or extra expenses caused by discharging over the bow, because the charter agreed that the cargo should be received within reach of the vessel's tackles ;

That the consignees, having made an advance to the master which by the charter was to be free of commission, could not claim a commission on it by reason of having made the advance before they were required to do so. *Sleeper vs. Puig*. 181

2. A charter provided that freight was to be paid on the cargo, which consisted of lumber and timber, at so much "per M. inch board measure:"

H. H. That the meaning of the charter was that all the timber carried was to pay freight, except only the ends of sticks where the ends were not square. *118 Sticks of Timber*, 86

3. L., as agent for the owners of a steaming tug, conferred with T., in relation to a charter of the tug by T. and others. The terms of the charter were agreed upon between them. L. had insisted that security should be given for the payment of the charter money, and, T. having proposed one Lewis as surety, L. and T. met at his office, where the charters were drawn up by T. and signed. Lewis signing as witness, and each took his part of the charter. When L. saw that Lewis had signed only as witness he objected, and declared that the affair should go no farther, and that the boat should not leave the port till security was given. The boat had already gone to Hoboken to take on coal for the voyage, but the security not being given, she went no farther, and T. and his associates filed a libel against the boat to recover damages for the refusal of the owners to perform the charter.

H. H. That on the facts, the charter was not completely executed, and that the action could not be maintained. *The H. W. Edge*, 238

4. A vessel was chartered to go from New York to ports in the West Indies and back to New York. The charter was expressed to be for the purpose of carrying a circus company and their necessary tents, clothing, horses, etc. It provided for the payment of charter money at the end of each month and it bound the vessel "and the merchandise taken on board" to the performance of the charter.

On the return of the vessel, while she was at Flushing, L. L., and before she was towed to her pier in New York, and before any of her cargo was discharged, the owner of the vessel filed a libel to recover a balance of charter money due and attached the horses and paraphernalia

of the circus company on board.

The charterer excepted to the libel:

Held, That the property attached was cargo, on which the lien for charter money was given by the charter;

That the clause in the charter making the charter money payable by instalments, at a place where the vessel would not probably be when the time of payment arrived, did not destroy the lien on cargo given by the charter;

That the failure to pay the monthly instalments due before the filing of the libel was a breach of the charter, and the owner of the vessel had a lien on the cargo for his security;

That the libel was not prematurely filed, and the libellant was entitled to recover. *Fourteen Horses*, 358

5. S., the master of a schooner, chartered her in Jacksonville, Florida, to D. and B., to carry a cargo of lumber to Cape Haytien, "charterers to pay all the vessel's port charges at Cape Haytien, including pilotage, consul's fees," etc. The vessel took the cargo and delivered it at Cape Haytien to L., the consignee named in the bill of lading, who was a contractor for the building of a dock for which the lumber was destined, and who had an agreement with the Haytian Government that vessels coming to the ports of Hayti, laden exclusively with materials for the dock and clearing in ballast for a foreign port, were exempted from tonnage dues. This agreement was not known to either of the parties to the charter before the arrival of the vessel at Cape Haytien, and before her arrival the master had executed another charter to take a cargo from Miragoane, another Haytian port. By the laws of Hayti the schooner, before clearing from Cape Haytien for Miragoane, was bound to pay \$381 of tonnage dues. The master claimed that under the charter the charterers were bound to pay the tonnage dues, as being "port charges." The consignee refused to pay them except by deducting them from the freight. This, therefore, he did, and took a receipt for the rest of the freight

money, which read that it was "in full for freight, * * * less advances, tonnage dues, etc., paid for my account," which the master signed and he also made a protest against the deduction. The master then filed a libel against the charterers to recover the \$381:

Held, That the tonnage dues payable at Cape Haytien for the cargo to be taken on board at Miragoane were port charges payable by the charterers;

That, the parties being ignorant of the consignee's agreement when the charter was made, their rights, under the charter, were not affected by it;

That the presumption would be, not that the vessel was going to leave Cape Haytien in ballast, but that she would take an outward cargo;

That the giving the receipt did not, under the circumstances, constitute an account stated between the parties, and that the libellant was entitled to recover.

Smith vs. Drew & Bucki. 614

See SALE OF CARGO.

CODE OF PROCEDURE.

See PRODUCTION OF BOOKS AND PAPERS, 1.

COLLECTOR.

See PRODUCTION OF BOOKS AND PAPERS, 3, 4.

COLLISION.

I. STEAM VESSELS.

1. A boat of the Brooklyn Annex line running from Jersey City to Fulton street, Brooklyn, came in collision with a barge in tow of a tug coming down the East River just outside of the piers. As a consequence of the collision the ferry-boat sank, and suit was brought for damages; the same person appeared as claimant for both tug and tow when they were both libelled, and gave a single stipulation for value to stand for both vessels, by consent:

Held, That the tug and tow were in fault, and, under the practice adopted in giving a single stipulation for both, it was not necessary to decide which of them was in fault, if only one;

That it was negligence in the tug and tow to pass so close to the piers and contrary to the statute of the State in regard thereto;

That it was negligence for the tug to take her tow between the ferry-boat and a boat of the Fulton Ferry as she did, when any swing of her tow in passing would have rendered a collision with one or other almost certain;

That no fault of the Annex-boat contributed to the collision;

That she was not in fault in coming out from her slip after the collision, in an attempt not to sink in a crowded slip, but to reach Jersey City, which failed because her pumps would not keep her free: those in charge having examined the injuries and being of the opinion, at the time, that she could be kept up, the effort was, under the circumstances, laudable and cannot be held to have increased the damage.

Motion for re-hearing, on the ground that since the trial libellant's witnesses testified differently in another action, growing out of the same collision, was denied. *The John Cooker & James W. Ecton.* 488

2. A collision occurred in the evening of October 1st, 1875, about off pier 1, East River, in New York harbor between two steamers, the T. and the S. M. N. The T. was bound from pier 5, East River, to pier 14, North River, to lay up for the night. The S. M. N. had towed a bark in from sea and anchored her between Bedloe's Island and the Battery, and was bound for pier 16, East River. Both boats had their lights set and burning. The pilot of the T. averred that a ferry-boat having passed ahead of him going to the northward, he ported his wheel, following her up, and as she passed him he saw both the red and green lights of the S.

M. N. ahead of him about 400 to 500 yards off his bow at the time making seven or eight times as much. That he at once blew one whistle and pulled his wheel and kept it a port wheel till the S. M. N. came in collision with the T. striking her in the port side nearly in the middle. That the S. M. N. answered his single whistle with a single whistle but that her pilot starboarded his wheel instead of putting it astern and that when the vessels were close he kept his engine astern at half speed till he gave the T. more speed and if possible got by.

The story of the S. M. N. was that she saw the green light of the T. on her starboard bow, whereupon the pilot of the S. M. N. blew two whistles and put her wheel slightly to starboard and that the T. after waiting about a minute, answered with one whistle and pulled her wheel and ran across the course of the S. M. N. and thus caused the collision.

Held. That it is difficult to believe that, after the pilot of the S. M. N. had answered the single whistle of the T. with a single whistle, he starboarded his wheel.

That if the account of the pilot of the T. were true, he was in fault, because as soon as he saw that the S. M. N., after having answered his whistle with one whistle, was running down on him with a starboard wheel, he should at once have stopped and backed, instead of increasing his speed.

That, on the evidence, the S. M. N. blew two whistles before the T. blew one, and that at that time the green light of the T. alone was visible, and that the S. M. N. did not answer the single whistle of the T. with a single whistle.

That the T. was solely in fault for the collision. *The Senator Mike Norton and The Texas.* 440

2. Where a ferry-boat, already in sinking condition from collision with another boat, in attempting to

go into her dock, came in collision with a canal-boat in tow of a tug, and afterwards sank:

Held. That as the sinking condition of the ferry-boat was an inevitable result of the first collision, and the loss which resulted was not increased by the second collision, the question whether the tug or the ferry-boat was in fault was immaterial. *The C. F. Starin.* 494

4. Where a fast steamboat on her regular run down the North River to Coney Island was making for a landing near the Hudson ferry, and came at full speed close into the pier, and struck a ferry-boat just coming out of her slip:

Held. That the steamboat was in fault for running at such high speed in that locality, with knowledge of the position of the ferry-slip and the presence there of the ferry-boat.

That the ferry-boat was not in fault for attempting to back, to avoid the collision, instead of going ahead.

To attempt to pass a ferry-slip at such a rate of speed as renders it impossible to stop in time to avoid hitting a ferry-boat, in case one should come out, is negligence. *The D. R. Martin and The Moonachie.* 532

5. The barge C., being towed down the North River alongside of the tug D., came in collision with a scow in tow of the tug B., which was going up the river. The owner of the barge filed a libel against the two tugs and the scow to recover the damages sustained by her. Each of the vessels filed a separate answer. Each tug denied any fault on its part and charged that the collision was due to fault of the other tug. The case was submitted to the court on the pleadings alone.

Held. That the fact of the helplessness of the barge was *prima facie* evidence that the collision was caused by the negligence of one or the other or both of the tugs, but was not *prima facie* evidence of the negligence of either tug alone.

That the answers of the tugs were not evidence against each other;

That there was therefore on the facts admitted no presumption of fault against either tug;

That the answer of neither tug admitted that the tug was acting in violation of the 18th rule of navigation;

That the question whether that rule imposes on the two vessels an obligation to port the helm depends partly on the distance between the two courses on which the vessels are proceeding, and the rule does not preclude the vessels from passing on the starboard side, if the movement for that purpose is seasonably commenced and executed;

That the libel therefore must be dismissed against all the vessels. *The James Bowen, The L. P. Dayton and The Number Four*, 430

6. A schooner bound east and a steamer bound west came in collision in Long Island Sound in the night. Both vessels had proper lights set. The schooner averred that she was heading east half north; that the steamer was seen ahead a little on her port bow; that the schooner was kept on her course, and the steamer changed her course to the southward across the schooner's bows, and thus caused the collision. The steamer averred that she was heading due west, and that the schooner was seen ahead a little on the steamer's starboard bow, and that the schooner changed her course to the southward and ran into the steamer:

Held, That, on the evidence, the story averred on behalf of the schooner was correct, and that, she having kept her course, it was the duty of the steamer to have avoided her, and that the steamer, having failed to do this, was liable for the collision;

That, although the schooner had no lookout except her master, who was on her quarter-deck, yet as the steamer was seasonably seen and kept in view and the schooner was kept on her course, there was no fault in reference to the lookout,

which either charged the schooner with the collision or relieved the steamer from her responsibility for it. *The City of New Bedford*, 17

7. A schooner and a steamboat came in collision in New York Bay in the day time. The wind was strong, about W. by S. The schooner was coming up the bay, heading up for the Narrows, and the steamboat was going down the bay to sea. The libel of the schooner alleged that while she was coming up the bay, heading about N., she discovered the steamboat about a quarter to half a mile off, she having been, till then, hidden from view by other vessels which were also coming up the bay; that the steamer, when seen, was a point or two on the schooner's starboard bow, heading about W. N. W., and backing her engines; that soon after the steamboat started ahead with a starboard wheel, on a course attempting to cross the schooner's bow, but so that a collision was inevitable; and that the schooner luffed to prevent the vessels from coming together head and head and was struck by the steamboat on her starboard side. The steamboat alleged that she, when going down the bay, and heading about S. by E., met several schooners coming up; that she was on the west side of the channel along by the West Bank, and that while the schooner was on her port bow, apparently about to pass on the port side of the steamboat as a schooner ahead of her had done, the schooner without cause luffed across her bows and thus caused the collision:

Held, That the turning points of the case were whether the schooner, at the time she luffed, had the steamboat on her port bow or on her starboard bow, and whether the luffing of the schooner contributed to produce the collision;

That, on the evidence, the schooner had the steamboat on her starboard bow;

That the allegations of the schooner, as to the steamboat's heading to W. N. W. and backing, and going

ahead again and coming into the schooner on a starboard wheel, were not proved, but were immaterial and immaterial inasmuch as it was not proved that the schooner did anything wrong before she luffed;

That, on the evidence, it appeared that the course of the steamboat was on a line eastward of that of the schooner, and that her pilot, in endeavoring to get to the westward of the schooner, crossed her bows and did not take this manœuvre when there was not time and distance for him to perform it;

That, on the evidence, the luffing of the schooner was a movement in no way contributing to produce the collision, and that the steamer was solely liable for the collision. *The Mary and The Ketchikan.* 349

That a schooner belonging to citizens of the United States was sunk and totally lost with her cargo in a collision with a steamer belonging to a citizen of Great Britain, at sea, off the east end of Long Island, on the night of April 13th, 1877. The schooner was the E. S. E., about a two and a half to three knot speed, and the schooner was on the eastern tack heading N. E. by E. The schooner had been running on a course from S. to S. from the Light-house at Sandy Hook, at a speed of about seven knots an hour. There was a heavy fog at the time of the collision, which occurred afterwards proved to be a fog horn was being blown on the schooner and continued to blow after the whistle of the steamer was heard, and her course was kept on the instant of collision. The lights were set, but the schooner was approaching her at such a rate that they were not visible, and she showed no torch-light. The general state of the schooner was not in charge of the captain. The sound of the fog horn of the schooner was heard on the starboard bow of the steamer, her engine was at once stopped and her helm put hard-a-sternward. The captain was also ordered to come to the bridge, and

as soon as he came, he ordered the engines to be stopped and reversed. The lookouts and the officers on the bridge kept a sharp lookout for the vessel, whose horn they heard, but they could not see the schooner till she was close under the steamer's bows. The headway of the steamer was almost stopped at the time of the collision, but she struck the schooner on her port side about forty feet from her stern, and the schooner, which was loaded with coal, shortly afterwards sank. The owners of the schooner filed a libel against the owner of the steamer to recover for the loss of the schooner, her freight and her cargo:

Held, That, the schooner having kept her course, it was the duty of the steamer to have kept out of her way;

That, under the circumstances of the density of the fog, in which the steamer was navigating, and the liability, in that part of the ocean, to fall in with vessels, the speed of the steamer was not a moderate speed, as she was not under such control that she could be stopped in time to prevent a collision with such vessels as she might expect to meet;

That the starboarding of the steamer's helm was proper, but that she was in fault in not stopping immediately upon hearing the fog horn:

That the schooner was in fault for her failure to show a torch light on hearing the steamer's whistle, as required by the Act of Congress of 1871 (16 Stat. at Large, p. 459, now § 4,234 of the Revised Statutes), and that the facts that the steamer was a British vessel and the collision was on the high seas, did not prevent the respondent from setting up such failure as fault in this action;

Whether, independent of the statute, it would have been a fault under the general maritime law, that the schooner failed to exhibit a torch under these circumstances, *quære*. That, the schooner being in fault in not having shown a torch, it became necessary for her to show that such fault had not contributed to the col-

lision, and that she had failed to do so ;

That, both vessels being in fault, the damages must be apportioned ;

That the owner of each vessel must bear half of the loss ; and that the owners of the schooner must bear half of the loss of the cargo and of the seamen's effects ; and the decree should be that the whole damages caused by the collision be apportioned between the parties ;

That it was unnecessary to make the owners of the cargo of the schooner parties to the suit, they being already virtually before the court through the libellants, the owners of the schooner.

Leonard vs. Whitwill, 638

9. Where a steam-lighter, bound from Hoboken, N. J., around the Battery to the East River, and a steamship, which had come round the Battery into the North River and was making for her berth at Pier 10, against the tide, came in collision, whereby the lighter was sunk, and her owner libelled the steamship, alleging various faults of navigation :

Held, That only one of the faults charged, that of porting her helm, could have interfered with an effort on the part of the lighter to avoid the steamship :

That the steamship did not port her helm, but kept her course, as she was bound to do under Rule 18, and having stopped and backed when danger appeared, and let go her anchor, was not in fault for the collision ;

That the lighter, having attempted to cross the bows of the steamship, was in fault, and the libel must be dismissed. *The Bermuda,* 693

II. SAILING VESSELS.

10. Where two vessels came in collision near the Lightship at the mouth of New York Harbor, the ship B. A., sailing about north on the port tack, close-hauled with the wind WNW, and the brig C. W., sailing about SW, having just changed to the starboard tack and again putting her helm down, *in extremis* :

Held, That the only question was whether the brig changed from the port to the starboard tack when so near the ship that the ship could not thereafter avoid her ;

That upon the evidence it must be concluded that the red light of the brig which should have been brought in view by that change was visible to the ship at least five minutes before the collision and at a distance of at least 3,000 feet ;

That such a distance and length of time was ample for the ship to have avoided the brig ;

That the brig was not in fault for tacking as she did at that distance, and the ship was in fault for not seeing her red light until it was within 360 feet and too late to avoid the collision.

The British America, 417

11. A collision took place in the night between a schooner and a brig, off Barnegat. The wind was E. N. E. and the schooner was sailing N. by E. and the brig was sailing S. by W. The schooner alleged that she saw the brig a little on her lee bow ; that she kept her course ; that the brig luffed and came into her, striking her on the port side. The brig alleged that she made the schooner a little on her starboard bow, being about three-quarters of a mile away, and showing no light ; that the brig then luffed about three points ; that the schooner then also changed her course across the bows of the brig and thus caused the collision :

Held, That the evidence of the witnesses on the brig as to a change of course on the part of the schooner did not overpower the positive evidence of the master of the schooner, who was at her wheel, that her wheel was not changed, but that she kept her course ;

That what the witnesses from the schooner testified as to what they saw of the navigation of the brig agreed with the evidence from the brig as to what she did, except as to the time when it was done ;

from the schooner to enable the tug to make fast to the barge again before she reached the schooner ;

That the tug, also, after casting off the barge, failed to keep a good lookout, and failed to warn the barge to starboard her wheel as soon as it should have been done ;

That the tug was therefore also in fault, and that such fault contributed to the collision ;

That the schooner was not chargeable with a fault contributing to the collision in anchoring where she did, notwithstanding the regulation of the port, especially as it appeared that vessels were in the habit of anchoring where she did.

The E. A. Parker and the John Neilson. 520

14. Where a vessel moored in New York harbor, upon a storm coming up, dragged her anchor and, before another was let go, struck another vessel at anchor astern, and did some damage:

Held, That her master had knowledge of the danger and took the risk of the ability of a single anchor to hold his vessel, and she was liable, therefore, for the damage, no fault being attributable to the other vessel. *The Eloina.* 458

15. The steamboat W. was moored outside of another steamboat, the O., alongside of a pier at Hoboken, other steamboats lying astern of them. All the steamboats were laid up for the winter, the W. being securely fastened to the O. and the pier. The owner of two barges, desiring to take them up into the slip to lie up, and not being able to do so on account of ice, made them fast for the night alongside of the W., being told to moor them there by a harbor-master, who was not shown to have any official authority as to the mooring of vessels. At that time it was known that, with a flood tide and an easterly wind, ice was liable to come into the slip with great force. During the night, the tide being flood, and the wind easterly, the ice did come in, and carried the

barges, and the two steamboats alongside of which they lay, away from the pier and against the steamboats lying astern, and the W. was injured by such collision :

Held, That the injury did not arise from inevitable accident ;

That the barges were not properly moored to guard against a danger which was then to be apprehended ;

That the injury to the W. resulted from the mooring of the barges alongside of her and that they were liable for the damages. *The Energy and The M. F. Winch.* 158

16. A steam-tug, having three barges in tow, went into the cove at the foot of 65th street, East River, to take up a fourth. In coming in, her engine caught on the centre and she drifted towards the rocks. The pilot, as soon as possible, turned her head out of the cove and went ahead, but before he could get out, she was carried by the tide so near the Point as to run against the corner of a floating bath house which was moored to the shore there :

Held, That the bath house was not a vessel ;

That the admiralty had jurisdiction of a libel filed by the owner of the bath house against the tug, to recover the damages caused by the tug ;

That the tug was not in fault for the engine's catching on the centre, or in her navigation otherwise, and the libel must be dismissed.

The M. R. Brazos. 435

See DAMAGE.

DAMAGES 1, 3.

PRIORITIES.

TUG AND TOW.

COLLUSION,

See JURISDICTION.

SALE OF VESSEL.

COMMON LAW CAUSE.

A suit *in rem* for forfeiture of property by reason of violation of the Internal revenue laws is a "common law cause," within the mean-

ing of U. S. Revised Statutes, § 916
re-enacting the Statute of 1872,
ch. 255, § 6: 17 Stat. at Large, 197).
*A Quantity of Manufactured To-
bacco.* 447

COMMISSIONS.

See COSTS 2.
LIEN 4.

CONSIGNEE.

See OWNERS.
PRACTICE.

CONSTRUCTION OF STATUTES.

1. In the construction of the Revised Statutes of the United States the presumption is against an intention to change the meaning of a statute enacted therein. And no change of meaning will be imputed to a change of phraseology, unless the language used indicates an intended departure from the re-enacted statute.

U. S. Rev. Stat. § 865 is to be construed as a re-enactment of part of the 23d section of the Act of Sept. 24th, 1789, and is not to be construed as changing the construction of that section in respect to the time when *denunciations de bene esse* may be made.
U. S. ex. T. v. Ken. 170

2. While in the construction of the Revised Statutes of the United States the presumption is against an intention to change the law, yet where the language used in the revised statute possibly bear the same construction as the revised and previous Act, full effect must be given to the new enactment.
U. S. v. Ken. 400

See PRACTICE.

CONTEMPT.

See PRODUCTION OF BOOKS & PAPERS.

CONTRACT.

See INDEMNITY.
INSURANCE.

COSTS.

1. The compensation to the Clerk of the Court for searching for petitions in bankruptcy is not expressly provided for in section 828 of the Revised Statutes of the United States.

A reasonable compensation for such service is fifteen cents for each name searched against.

Vermeule's Case,

1

2. The practice of the court allows as a disbursement to a party who may be entitled to costs, what may have been properly paid by him for the execution of a foreign commission to take testimony. But disbursements must be reasonable and must have been necessarily incurred, and are not to be deemed to have been necessarily incurred unless they are reasonable for the service rendered.

If such a commission is issued to another State of the Union, addressed to a person other than one of the "commissioners of the Circuit Court," the compensation fixed by law for such services, when performed by a commissioner of the Circuit Court, fixes a standard which should control the discretion of the court as to the amount to be allowed for the fees on the execution of such commission.

If the commission issues to a foreign country, where no officers are provided by the law of the United States for the execution of such commission with definite fixed fees, the amount allowed by law here will be taken to be a sufficient compensation for the same service abroad, unless it be shown that the customary charge in such foreign country is greater. If that is shown, it must be held that the party taking out the commission necessarily pays such larger sum.
Seagwick v. Grinnell, 6

3. In a salvage case where the libellants had demanded an exorbitant compensation, costs refused except that the costs of a reference ordered to ascertain certain dam-

age to the cargo of the salving vessel, the owners of which cargo had intervened as co-libellants, should abide the event. *The Colon and her cargo*, 60

4. A libellant, who had claimed to recover \$9.50 a day for wharfage, and recovered only $\frac{1}{2}$ of it, was refused costs.

The City of Hartford, 150

5. The owner of a canal-boat lying at a pier which was injured by the swell thrown by a passing steamboat, having given no notice of his claim to recover damages for thirty days, was refused costs.

The Massachusetts, 177

6. The injunction granted in a proceeding to limit the liability of a ship owner, restraining the prosecution of suits pending against the ship owner, should not prohibit the collection of the taxable costs in such suits.

In such a proceeding the costs and expenses of the proceeding are first to be paid out of the fund.

The petitioner in such a case is entitled to a docket fee for each creditor who comes in and proves his claim. But he has no preference for his costs over the costs of the creditor.

Petition of the N. & N. Y. Trans. Co., 193

7. Owners of a tug who had rendered salvage services to a brig, and material-men who had done repairs to her, filed separate libels against her. The owners of a vessel injured by collision by the brig also libelled her; and the proceeds were insufficient to pay the claims:

Held, That as the owners of the tug and the material-men had appeared by the same counsel and proctors, only one bill of costs should be taxed. *The Remnants of the Jeremiah*, 338

8. A tender to a seaman was held to have been good. But though it had not been kept good by the payment of the amount into court un-

der Rule 72, the suit being unnecessary and the difference between the parties trifling, no costs were allowed to the libellant.

The Brothers, 400

9. A libel having been dismissed with costs, the clerk taxed for filing and entering "claim," "answer," "appearance" and "consent" twenty-five cents each;

Held, That the clerk was entitled to only ten cents each, and could not charge as for "making a record."

The clerk taxed five oaths at ten cents each, and five jurats at fifteen cents each:

Held, That the charge for the oath did not include the jurat, and the charges were correct;

That a charge of \$3 for the attendance of the clerk on the justification of sureties was correct, as being a reasonable compensation for the service;

That a clerk's fee of fifteen cents for making up the costs on the bonding of the vessel was proper;

That a charge of \$9.50 as for taking depositions by a commissioner was correct, although it appeared that the witnesses appeared before the commissioner and were sworn, and then by consent of the proctors the examination of the witnesses was written down, but not by the commissioner or in his presence, and the witnesses were then brought before him and sworn to the depositions, and he made the customary certificate;

That an item of \$50 paid to a notary public for taking depositions was correctly allowed, although he was a clerk of the proctor of the claimant;

That the charge of \$2.50 a day allowed to the marshal, by statute, for "expenses of keeping vessels," does not include wharfage, and that a bill for wharfage paid by the marshal, for the vessel, while she is in his custody, can be properly taxed as a disbursement.

The F. Merwin, 404

10. A vessel was seized by the marshal under a monition and there-

that was made in a stipulation
for the purpose of the
H. M. That the canal-boat was prop-
erly laden and made fast, and
that, though such boats as the M.
pass the place daily, no other such
accident was shown to have occur-
red, and that the case was not there-
fore one of inevitable accident :

That the M. was not in fault in going
through that channel, or in going
too near the canal-boat, but was in
fault in running with excessive
speed, and that the loss was due to
such fault and the steamboat was
liable therefor.

The Massachusetts. 177

See **Costs** 5.
SALVAGE.

DAMAGE TO CARGO.

1. A quantity of sacks of barley were shipped at San Francisco, to be carried to New York, under bills of lading which excepted perils of the sea. The ship met with heavy weather and began to leak before she reached the Horn, and put into Rio in distress. A survey was had, which recommended that the cargo be discharged until the leak should stop or the ship should be in ballast trim. Accordingly, all the cargo was discharged, except 3,093 sacks of barley forming the ground tier, with some at the ends of the ship. A second survey was then had, which reported that the underside of the ground tier was damaged by sea-water, but recommended that all the cargo, damaged or not damaged, should be taken forward. The ship was then repaired, the cargo was reloaded, it being all then dry, and the voyage completed. On the discharge of the cargo at New York it was found not only that a portion of it had been damaged by salt water, but that the rest of it, though in external appearance undamaged, had to a great extent lost the malt-tinting quality, and it was sold at auction at a loss, and libels were filed against the ship to recover the damage :

for damages and thereafter filed a libel to recover against the steamer:
H. M. That the canal-boat was prop-
erly laden and made fast, and
that, though such boats as the M.
pass the place daily, no other such
accident was shown to have occur-
red, and that the case was not there-
fore one of inevitable accident :
That the M. was not in fault in going
through that channel, or in going
too near the canal-boat, but was in
fault in running with excessive
speed, and that the loss was due to
such fault and the steamboat was
liable therefor.

Held, That, as to the cargo which appeared to have been wet with seawater, the ship was not responsible, because it came from the leak, which was a peril of the sea;

That, as to the destruction of the malting quality, the cause of it appeared to be the leak, which, causing a damp atmosphere in the hold, had led to the germination of the grain, and that the presumption was that the leak had caused that damp atmosphere before the ship arrived at Rio, and that there was no evidence to overbear that presumption;

That, on the proofs, the master, having followed the advice of a duly constituted survey in good faith, could not be held negligent in taking in the cargo that had been discharged without taking out the ground tier;

That the action could not be maintained, inasmuch as no breach of duty on the part of the master had been shown.

The Blue Jacket.

248

2. A ship took on board at Manila a large quantity of mats of sugar, to be brought to New York, under bills of lading containing the usual exception of perils of the sea. On the voyage she met with heavy weather and sprung a leak so that, after having jettisoned a part of her cargo, she arrived at her dock with ten feet of water in her hold, her crew having become so worn out by labor that after she had passed quarantine a gang of fresh men was sent to her, who were, however, able to control the leak with the ship's pumps. The consignees of the ship at once agreed with the owner of a steam pump, and the pump was put on board the ship, and by the next morning the water in the ship had been pumped down as far as the suction pipe of the steam pump reached, which was just about at the bottom of the sugar. During the following day, the pump, which was in charge of an engineer and fireman employed by its owner, was worked at intervals as the water

rose high enough to reach the suction pipe. The discharge of the cargo had been commenced and continued during that day. During the following night, none of the ship's officers or crew being on duty, the steam pump stopped working, and the water again flooded the lower hold where the sugar was stowed. The consignees of the sugar filed a libel against the ship, claiming to recover damages for a failure to deliver the sugar in like good order as when received, as she had contracted in the bills of lading to do; and the owners of the ship set up as a defence that the damage was occasioned by peril of the sea:

Held, That, the leak being shown to have been a peril of the sea, the ship had made out her defence as to the cargo jettisoned, and as to the sugar washed out by the leak and the injury caused by the leak to that which remained, up till the time when the water was first pumped out of the ship by the steam pump;

That the duty of the ship, on arriving at the dock, was to use whatever extraordinary means were accessible to prevent further injury to the cargo; and that the employment of the steam pump was an act of the master, in performance of that duty, and not an act of the master as agent of the cargo in extraordinary peril;

That the persons working the steam pump were therefore the agents of the ship and not agents of the owners of the cargo;

That the ship, therefore, was responsible for the proper performance of duty by those in charge of the steam pump;

That, although the original leak was a peril of the sea, the owners of the cargo, having shown that the leak could have been controlled by the use of means which were available, and that such leak had not been controlled, had made out a case of negligence on the part of the ship;

That the ship, having failed to give any explanation of the stoppage of the steam pump on the night in

pay that sum in full discharge of the claim for freight. The sugar was partly in bags and boxes and partly in hogsheads. The damage to the sugar was caused by sea water, and it was in the sugar that was stowed near the centre-board-well. There was a contest on the evidence whether there was any dunnage by the well. The master of the vessel thought the damage was caused by sweat and had refused to make a declaration for the consignees that it was caused by sea water:

Held, That there was dunnage by the centre-board-well, but that it was not sufficient to protect the cargo near it from damage by the ordinary and usual leakage in that part of the vessel; that there was no proof of such weather as to constitute peril of the sea, and that however difficult it might be to protect cargo near the centre-board-well from damage by such ordinary and usual leakage in the well, that was a duty which devolved on the ship: That the damages sustained by the sugar must therefore be deducted from the amount of freight; That the tender was insufficient.

Endicott vs. Renauld. 582

See DELIVERY OF CARGO.
MARINE INSURANCE.
SALVAGE.

DAMAGES.

1. A bark, having been injured by a collision with a steamer, arrived in New York, where the agents of the steamer repaired the damages. The owners of the bark then filed a libel to recover demurrage for the detention of the bark while being repaired. The owners of the steamer set up that it was agreed that the repairing of the damages should be in full satisfaction of the claim. They also claimed that they could have hurried the repairs so as to have finished them in much less time, if the master of the bark had informed them of an offer of a charter, which it appeared he had, and which he refused because he

was not certain that his vessel would be ready in time to begin to load under it:

Held, That the burden was on the steamer to establish the agreement that the making of the repairs should be in full satisfaction for all damages, and that on the evidence she had not established it;

That the master of the bark was not bound to have communicated to the agents of the steamer the offer of a charter which he had had; that his refusal to accept it was in good faith, and that the libellants were entitled to recover demurrage for the detention of the bark.

The Baltic. 631

2. A canal-boat, while on a voyage to Port Johnson, to take on board a cargo of coal which she had agreed to carry to Middletown, Conn., at a stipulated rate, was injured by a tug, which was held liable to pay the damages. The commissioner, to whom it was referred to ascertain the damage, reported as part of the damages \$53.80, the estimated net freight which the boat would have earned. It was proved that the voyage in question would have taken fifteen days; that the boat was detained for repairs five days, and at the end of that time was again employed by her owner in her usual occupation:

Held, That the owner of the boat was not entitled to recover the whole of the net freight, but only a proportionate part, viz., one-third of it.

The Gorgas. 686

3. In a collision case the owners of the injured vessel may recover interest on the sum allowed them for the demurrage of their vessel.

A reasonable sum for the care and custody of cargo is also to be allowed, but not interest on the value of the cargo. *The Alexandria.* 701

See COLLISION 8.

DELIVERY OF CARGO.

A cargo of sugar was shipped from Bahia to New York in bags. The sugar was green, and the drainage

from it on the voyage excessive: the vessel also met with heavy weather. On discharging, many bags were found broken, and new ones were furnished and refilled. A quantity of sugar was also swept up from the hold, and sold by the crew with the master's knowledge. The consignee claimed, claiming \$1,500 damage for total loss of cargo:
Held, That he could only recover for the value of the sweepings and.
The Gomez de Castro. 540

See BILL OF LADING 2.
 CHAPTER 1.

DEMURRAGE.

A freight broker engaged for a bark 100 tons of oak logs and 100 tons of copper ore. The freight contract, which was in writing, said nothing about the time to be occupied in the receipt of the cargo, or the manner in which it was to be delivered to the ship. On the day after the contract was made the shipper of the timber retained the agent of the ship that the wood was heavy timber, and that the bark should be ready with corresponding tackle to take it "off the lighters" as soon as they arrived. The timber was sent afloat in lighters, and, owing to the shallowness of the bark's hatch, and the contracted space between coams, through reasonable diligence was used in taking the timber on board, the lighters were detained a month several days. The shipper filed a bill against the bark to recover the amount of the demurrage of the lighters, claiming that the cargo was agreed to be received from lighters in the customary time, and that by the custom of the port of New York two days only were allowed for that purpose:

Held, That, as the contract did not say that the wood was to be received from lighters, the shipper could not, by his notice, impose any new terms on the bark:

That the shipper had the right to deliver the wood alongside in what way he pleased, and it then became the duty of the bark to receive it:

That no unnecessary delay or damage on the part of the bark in receiving the wood was to be imputed, and that the demurrage be disallowed.
The Innocent. 421

See BILL OF LADING, 1, 3.
 CHAPTER 1.
 DAMAGES, 1, 3.
 PRACTICE, 1.

DESPATCH.

See CHAPTER 1.

DEPOSITIONS.

1. Depositions *de bene esse* taken pursuant to U. S. Rev. Stat. § 883 may be opened before the trial by order of the court upon motion of one party to the suit and against the objection of the other party.
The United States v. Tilden. 170

2. On a motion to suppress depositions of witnesses for claimant because taken before answer:

Held, That no rule of practice requires answer to be filed before taking depositions; and no prejudice to the libellant in this case appearing, the motion must be denied.

Semie, That where answer is delayed for a purpose, and prejudice to the libellant's case appears, such a motion might prevail, in the absence of a rule. *Pride of the Ocean*. 610

See CONSTRUCTION OF STATUTES.

E

ESTOPPEL.

See BANKRUPTCY, 3, 4, 5.
 JURISDICTION.
 SALE OF VESSEL, 3.

EVIDENCE.

1. Bananas, forming part of the cargo of a steamer, were injured by her detention in performing a salvage service, in a suit upon which the owners of the cargo were held entitled to damages. Evidence

showed that the fruit would have been in good condition on the day the vessel would have arrived but for her detention, that the market was bare that day with no sales, and that similar fruit netted \$1.83 per bunch 7 days later. The commissioner fixed the damages, taking the sound value of the fruit at \$1.98 per bunch, on the day the vessel should have arrived. Exceptions being filed to the report:

Held, That the evidence was properly admitted and the weight of it sustained the report. *The Colon*. 366

2. An alleged custom to receive cargo from a lighter in two days is not proved by evidence of the adoption by "The New York Produce Exchange" of a rule to that effect, such association having no power by their rules to make a custom binding in the port of New York. *The Innocenta*. 411

See BANKRUPTCY, 2.
COLLISION, 5, 11.
HABEAS CORPUS.
JURISDICTION.
NEW TRIAL.
SALE OF VESSEL, 2.
SALVAGE.
SEAMEN'S WAGES, 6, 8.

EXECUTION.

See ARREST.
BANKRUPTCY, 1, 4.
COMMON LAW CAUSE.
STIPULATION, 2.

EXTRADITION.

See HABEAS CORPUS.

F

FORFEITURE.

The Act of March 3d, 1863, ch. 76, § 1 (12 Stat. at Large, p. 738), provided that in case of the knowingly entering goods by means of a false invoice, etc., the goods or the value thereof should be forfeited. In embodying this statute in the Re-

vised Statutes, § 2864, the words "or the value thereof" were omitted, and the Act of 1863 was repealed. By the Act of 1875, ch. 80 (18 id. p. 319), passed February 18, 1875, section 2864 was amended by restoring the words "or the value thereof." After the passage of the Revised Statutes but before the passage of the amending Act of 1875, certain goods were knowingly entered by means of false invoices:

Held, That, under the statute in force at the time of the entry, the forfeiture of the goods was absolute, and that it was not a case of a forfeiture of the goods or of their value at the election of the United States, and therefore a transfer for value to a *bona fide* purchaser or pledgee before suit brought gave no title as against the United States;

That, if the Act of 1875 was a repeal by implication of Rev. Stat. § 2864, the right of the United States was not thereby defeated, although the Act of 1875 contained no saving clause as to forfeitures already incurred, because that Act is subject to the provisions of Rev. Stat. § 13, which provides that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability under such statute unless the repealing Act shall so expressly provide." *The U. S. v. Four Cases of Lastings*, 371

See COMMON LAW.
INTERNAL REVENUE.
NEW TRIAL.

FRAUD.

See ARREST.
BANKRUPTCY, 1.

FREIGHT.

See BILL OF LADING, 4.
CHARTER, 4.
PRACTICE, 1.

FUGITIVE FROM JUSTICE.

See HABEAS CORPUS.

HARBOR REGULATIONS.

See COLLISION, 13, 15.

HUSBAND AND WIFE.

See STIPULATION, 3.
LACHES.

I

IDENTITY.

See HABEAS CORPUS.

INCOME TAX.

See BILL OF PARTICULARS.

INDICTMENT.

See HABEAS CORPUS.

INJUNCTION.

See COSTS, 6.

INSURANCE.

See MARINE INSURANCE.

INTEREST.

See BILL OF LADING, 4.
DAMAGES, 3.

INTERNAL REVENUE LAW.

1. Upon an information under Rev. Stat. § 3453, charging that certain distilled spirits seized, were found in a place mentioned and in the possession of persons unknown, for the purpose of being sold and removed in fraud of the internal revenue laws and with design to avoid payment of taxes thereon, and claiming the forfeiture of a large number of other articles of personal property found in the same place:

Held, That under that section it is not necessary, in order that such other personal property be forfeited, that raw materials intended to be used in the manufacture of articles subject to tax should be found in the same place.

The case of *U. S. v. 33 Bbls., etc.*, 1 Low. 239, disapproved. *The U. S. v. 16 bbls Distilled Spirits.* 484

2. Under U. S. Rev. Stat., § 733, which is a re-enactment of the 41st section of the Act of June 30, 1864 (13 Stat. at large, p. 239), as amended by the 9th section of the Act of July 13, 1866 (14 id. p. 111), and which provides that "taxes accruing under any law providing internal revenue may be sued for and recovered, either in the district where the liability for such tax occurs or in the district where the delinquent resides," a suit will not lie to recover such tax in a district other than that in which the tax accrues or that in which the delinquent resides, although he may be found and served with process therein. *The U. S. v. The N. Y., N. H. & H. R. R. Co.* 144

See COMMON LAW CAUSE.
NEW TRIAL.
SUCCESSION TAX.

J

JUDGMENT.

See JURISDICTION.

JURISDICTION.

Libels were filed against a tug to recover for the loss of three barges while in tow. D. appeared as claimant and owner of the tug and set up that, after the loss in question, the tug was libelled in the District Court of the Eastern District by C. to recover a claim which was a valid lien on her, and that under a decree in that suit by default the tug was sold, and that D. became the purchaser, and that by such sale, the liens of the libellants, if any they had on the tug, had been discharged. The cause coming on for trial and D. having offered in evidence the judgment record in the case of C. against the tug, the libellants objected to it as void for various alleged irregularities, and also offer-

ed evidence to prove that D. was master of the tug at the time of the loss of their boats, and also evidence by which they claimed to show that the sale of the tug in the suit of C. was collusive:

Held. That the objections to the verification of C.'s libel before a notary, and to the service of process by a special deputy, could not be maintained, in proceedings in this district:

That it was not essential to the jurisdiction in C.'s suit, that the marshal should continuously retain the vessel in his custody:

That there is no rule or statute requiring the exclusion of Sundays in the fourteen days required before the return of process *in rem*:

That the objections to the jurisdiction of the District Court of the Eastern District in C.'s case must therefore be overruled.

Whether the decree of that court in that case when offered in evidence did not exclude the evidence impeaching the jurisdiction of that court, *quære*.

Held. also, That on the evidence the suit of C. was prosecuted by him in entire good faith, and was not collusive:

That D., although master of the tug and in charge of her at the time of the libellants' alleged loss, was not bound to notify them that C.'s suit was commenced, or that the tug was to be sold under the decree in it: nor was he bound to defend the tug against C.'s claim, which was a valid one, nor was he prevented from buying the tug at the sale, nor was the effect of the sale to clear the tug from all liens lessened by D.'s having bought her at the sale;

That D. was not equitably estopped from setting up the decree in C.'s suit and the sale under it, against the claims of the libellants:

That, if the sale of the vessel had been unfair or for an inadequate price, the libellants, who knew of the sale within two days after it took place, might have sought a remedy by applying to the Court of the Eastern District to set aside the sale and open their default and let them in

to defend against C.'s claim, if they had any defence;

That, having failed to do this, their rights as against the tug were cut off by her sale, and their libels must be dismissed.

The E. W. Gorgas.

460

See COLLISION, 16.

EXTRADITION.

HABEAS CORPUS.

LIMITATION OF LIABILITY.

PASSENGER.

PRACTICE, 5.

SALE OF VESSEL, 1.

SEAMEN'S WAGES, 7.

L

LACHES.

A suit was brought by a married woman as owner of a canal-boat against a steamboat to recover the value of the boat and her cargo, lost by negligence of the steamboat. A decree was made in her favor on March 4, 1871, for \$2737.66 damages and \$331.91 costs. In May, 1871, an agreement to compromise was made between the proctors, and the stipulators paid \$2,000 in settlement. The owners of the cargo were parties to the settlement and the husband of the libellant was present and consented to it and also her proctor, who had since died. In March, 1879, a motion for leave to issue execution against the stipulators was made on behalf of the libellant, on her affidavit that she did not authorize the settlement and received no part of the \$2,000:

Held. That the facts as to the settlement created so strong a presumption of acquiescence on the part of the libellant that it was not overcome by her affidavit, and that in any event she could only enforce the decree for the amount of her interest in it, and, as she had not shown what that was, her motion must be denied. *The Deer.* 628

See BILL OF PARTICULARS.

MISTAKE OF FACT.

LAW OF THE SEA.

See COLLISION, 8.

LEX LOCI CONTRACTUS.

See SEAMEN'S WAGES, 2.

LEAVING PORT.

See LIEN 2.

LIEN.

1. Cargo had been delivered to a purchaser from the consignee without notice to him of any claim of lien for freight :

Held, That the lien of the vessel for the freight had been lost.

118 *Sticks of Timber*, 86

2. The departure of a steamboat, running between New York and Stuyvesant-on-the-Hudson from New York on her daily trip is a "leaving of the port," within the language of the statute of New York of 1862, chapter 482, in relation to liens on domestic vessels; and specifications of lien must be filed within twelve days from such departure, to make the lien valid.

The Monitor, 188

3. Casks, furnished to a whaler, to be stowed on board to receive the oil, are necessary for the vessel, and, by the law of the State of New York, a lien attaches to the vessel for the amount of the debt incurred therefor.

It is not necessary to file a specification of such lien, where the vessel has not left the State before her seizure under process issued to enforce such lien. *The Henry Trowbridge*, 415

4. Materials were furnished in the State of New York to a vessel owned in the State, by three parties, F., D. & M. Specifications of lien were filed, as required by the statute of New York, first by F., second by M., and third by D. A few days after D. had filed his specification of lien, he filed a libel against the vessel to enforce his

lien and the vessel was seized under the process. F. next filed a libel against her, and lastly M. filed a libel also. The vessel being sold and the proceeds not being sufficient to pay all the claims, the question of priority was brought before the court :

Held, That the order of the filing of the specifications did not determine the order of the attaching of the liens ;

That the rule that claims should be paid in the order of the filing of the libels was too well settled to be disturbed in this District, notwithstanding the authorities elsewhere in favor of a payment *pro rata*.

The Minnie R. Childs, 553

5. F. filed a libel against a vessel owned in the State of New York, to enforce a lien claimed to exist under the law of the State of New York, passed April 24, 1862. It appeared that F., as a broker, had negotiated a charter of the vessel for her owners, who resided at Sag Harbor, for a term of six months; that the charterer, who acted as master of her, applied to F. to know where he should get stores for the vessel and F. obtained from C. an order on L. for the stores, which were furnished to the master on that order. It appeared further that F. also procured \$215 of C. on a pledge of bills of lading and paid it to the master to disburse the vessel. The voyage was broken up so that the security failed and F. claimed that he owed C. the money. It appeared, also, that he advanced to the master \$20 for labor in getting the vessel moved from Jersey Flats to Brooklyn, and \$49 paid on request of the owners for wages of seamen on a previous voyage, and \$25 for obtaining a bond for the vessel when under arrest, which bond was not accepted, and \$25 for fees paid at the custom house. And he claimed \$41 for commissions in negotiating the charter :

Held, That it did not appear that the libellant furnished the stores or ad-

vanced the money necessary to procure them :
 That it was not sufficiently proved that the \$215 was advanced for the purpose of "procuring necessities" for the vessel, and, besides, it was advanced, not by the libellant, but by C. ;
 That there was no lien on the vessel under the statute for the amount advanced for custom house fees, or for the sum paid to procure a bond, or for the commissions, they not being included in the term "necessaries ;"
 That for the amount paid for moving the vessel the libellant had a lien, and also for the sum advanced to pay off the seamen, although by the terms of the charter, the charterer had agreed to pay all expenses of the vessel ;
 That as the principal part of the claim was disallowed, the libellant should not have costs.
 The case of *The John Farron* (14 Blatch. p. 29) distinguished.
The Lucia B. Ives, 660

See BOTTOMREY.
 CHARTER, 4.
 PILOTAGE.
 SALE OF VESSEL.
 SEAMEN'S WAGES.

LIGHTS.

See TUG AND TOW, 4.

LIMITATION OF LIABILITY.

1. A collision occurred between two schooners, the S. and the A. T., on May 6, 1878. On the 11th of June, 1878, the owners of the S. filed a libel against the A. T. to recover their damages. The A. T. had been in the meantime repaired. On the 14th of June her owners filed a petition to limit their liability. A reference was had to fix her value, and the commissioner reported that her value after the collision was \$500, and that the interest of the owners in her pending freight was \$139.25, and the owners of the S. excepted to the report :

Held, That the value, to which the liability of the owners of the A. T. would be limited, was the value of the vessel after the collision and before she was repaired ; that, as the vessel was sailed on shares by a master who was not an owner, the interest of the owners in the freight was one-half of it after deducting port charges, which the commissioner had reported ;

That the exceptions must be overruled. *Wright's Petition,* 14

2. An English steamship, the J. B., loaded with guns and munitions of war for the Turkish Government, and bound from New Haven to Constantinople, went ashore on Little Gull Island, at the mouth of Long Island Sound, and became a total loss. Some wreckage was saved from the vessel, and most part of the cargo, which went back damaged to the consignors. The owners of the vessel, no action for damages having been begun within six months, made petition for limitation of their liability to the value of the vessel and freight, offering tender of the vessel and her wreckage in their hands. An order was thereupon issued by the court, directing all parties interested to appear, and show cause why an appraisal of the vessel should not be ordered and why the petitioners should not have the relief which they asked. Notice of the order to show cause was published, and on the return-day some of the consignors and the insurers appeared specially to oppose the petition, and objecting to jurisdiction :

Held, That the ship-owners were not entitled to the benefit of the rule of the general maritime law limiting the liability of the ship-owners to value of the vessel and freight, but were entitled to the benefit of the statute of the United States (Rev. Stat., §§ 4283, 4284), though no action was in this case yet instituted against the ship *in rem* or the owners *in personam* to recover for the losses caused by the stranding ; and that the court had jurisdiction of the proceeding ;

That, the stranding having occurred within the territorial limits of this district, within which also the wreckage is, and no suit having been instituted in any other district, this proceeding was properly instituted in this court ;

That the libel should be amended so as to show the residence of the libellants, whether this be considered a proceeding *in rem* or *in personam*, under the 23d admiralty rule, but could not be held defective because it asked alternative relief, in a case like this ;

That the tender made in the libel of the vessel and wreckage to be disposed of by the court, was an abandonment such as the law requires ;

That the court had power under the statute and the rules of the Supreme Court, to direct the marshal to take property into his custody ; whether it had power to order a sale by the court, *quære*.

The John Bramall, 495

See COSTS, 6.

LOG.

See SEAMEN'S WAGES, 6.

M

MARINE INSURANCE.

The shipper of a cargo of barley, in sacks, from San Francisco to New York, insured it against perils of the seas. The policy contained a memorandum clause by which grain was to be "free from average unless general," also "free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils," also "subject to 20 per cent particular average." The ship met with heavy weather on the voyage and put into Rio, leaking, where, part of her cargo having been discharged, she was repaired and then, having been reloaded, she completed the voyage

to New York. On the discharge of the cargo, a portion of the sacks were found to have been wet with sea water, and the barley in them damaged thereby, but the damage on that part of the cargo did not equal 20 per cent of the property insured. But it was found that the malting quality of the rest of the cargo had been destroyed, as it was claimed, by dampness of the hold arising from the leak, and such damage amounting to more than 20 per cent, a libel was filed against the underwriters to recover the whole loss ;

Held, That, assuming that the damage to the sacks of barley, which were not reached by the sea water, was caused by damp vapor arising from other sacks that were reached by the sea water which came into the vessel through a peril of the seas, such damage was not caused by actual contact of sea water with the articles damaged, within the meaning of the policy; and that the insurance company was not liable on the policy.

The cases of *Woodruff v. The Com. Ins. Co.*, and *Corey v. The Boylston F. and M. Ins. Co.* (101 Mass. 143) commented on. *Neidlinger v. The Ins. Co. of N. A.* 254

MARKET VALUE.

See DAMAGE TO CARGO.

MARSHAL.

See COSTS, 10.

JURISDICTION, 2.

PROCESS.

PRACTICE, 5.

MASTER.

See BILL OF LADING, 3.

MARINE INSURANCE.

PASSENGER.

POSSESSION.

PRACTICE, 2.

SEAMEN'S WAGES, 10.

MISTAKE OF FACT.

A party entitled to recover money paid under a mistake of fact, is

bound to give prompt notice of the discovery of the mistake to the party to whom the money was paid. Where the party to whom money is so paid, sustains damage in the loss of his remedy over against another party, through the negligence of the party to whom he is liable in failing to give notice of the discovery of the mistake, he is thereby discharged from liability.

The action being equitable, the United States suing as plaintiff in such action is bound by the same equitable rules as any other plaintiff in such an action and cannot recover, if through its failure to give notice of the discovery of the mistake the defendant has lost his remedy over.

In such an action by the United States, where it appeared that the Assistant Treasurer at New York gave notice of the discovery of the mistake, and demanded payment, but afterwards withdrew the notice and demand:

Held, That assuming that he was the proper officer to give such notice he was the proper person to withdraw it, and the defendant having relied on such withdrawal and thereby lost his remedy over, was discharged from liability. *The U. S. v. The Union Nat. Bank*, 408

MORTGAGE.

See PRACTICE, 6.
SALE OF VESSEL.

N

NEGLIGENCE.

See DAMAGE TO CARGO.
MARINE INSURANCE.
TUG AND TOW.

NEW TRIAL.

A verdict in favor of the defendant, in a suit for forfeiture of goods for violation of the Internal revenue laws, will not be set aside as against the evidence, though as to a small part of the goods proceeded against,

the court entertains no doubt that upon the evidence the verdict is wrong. *The U. S. v. 117 Packages of Plug of Tobacco*, 343

NOTARY AND SEAL.

Although a libel upon which decree had been entered in another district appeared to have been sworn to before a notary public whose seal was not attached to his certificate, the absence of such seal did not vitiate the process issued on the libel, under the rules of the court requiring a sworn libel previous to the issuing of process against a vessel. Under the statute of 1876, chap. 304, the seal was not necessary to a due verification. At most its absence was only an irregularity, which could not be availed of after decree, in another proceeding before another court. *The E. W. Gorgas*, 460

NOTICE.

See HABEAS CORPUS.
LIEN, 1.
MISTAKE OF FACT.

O

OWNERS.

Where a vessel was repaired in the port of New York, upon the order of D. & R., to whom she was consigned, proceeded on a voyage, and was sold abroad on a claim for bottomry, and thereafter the ship-carpenter, who did the repairs in New York, brought suit against the owners, who resided in New York and Brooklyn, and they answered separately--E. setting up that the consignees, D. & R., were owners *pro hac vice* under an agreement to manage and control the vessel, receive all earnings and pay for all repairs and supplies, for a specified money consideration; and J. setting up the same agreement and also that libellant had knowledge of it:

Held, That it was not open to the defendants to dispute the authority of

D. & R. to order the repairs ; and having admitted their ownership and accepted the repairs in the increased value of their vessel, they are *prima facie* liable to pay therefor ;

That D. & R. were not proved to be owners *pro hac vice*, and this defence set up in the answers was not established ;

That while it appeared from the proofs that defendants were actually mortgagees out of possession, no such defence was set up in their answers and no question of their liability as such could therefore be considered. *McCarthy v. Eggers*, 688

See POSSESSION.

SAFE RETURN.

SALE OF VESSEL, 2.

P

PARTIES.

See COLLISION, 8.

PASSENGER.

F. filed a libel against a steamship, alleging that he took passage on her for Hamburg, with his wife and son, and that when two days out from New York, the master compelled them to leave the stateroom in the first cabin and confined them during the voyage in another room which was unfit for them. It appeared that the child was taken with an attack of small-pox or varioloid, and that the master of the ship directed the child to be removed to the steward's room, telling the father and mother that, if they went with it they must stay and would not be allowed to come into the first cabin again, and accordingly they were all removed and were not allowed thereafter to come to the first cabin :

Held, That the court had jurisdiction of the cause of action ;

That the act of the master was but the performance of his duty towards the other passengers ;

That the accommodations provided were reasonable, and that there was no unreasonable confinement, and that the libellant had no cause. *The Hammonia*, 512

PENALTY.

See ARREST.

PERIL OF THE SEAS.

See MARINE INSURANCE.

PILOTAGE.

A claim for half pilotage by a Hell-Gate pilot, under the statute of the State of New York, constitutes a lien upon the vessel.

But to establish such claim it must be shown that at the time of the tender of the pilot's services, the vessel was in the prosecution of a voyage which would carry her through Hell Gate.

The Kalmar, 242

PLEADINGS.

See BOTTOMRY.

HABEAS CORPUS.

OWNERS.

PRACTICE.

PORT CHARGES.

See CHARTER, 5.

POSSESSION.

By the agreement made for the building of a vessel, it was agreed that one L., who took an eighth of the vessel, should command and sail her as master. L. afterwards sold his eighth to K., who bought it, expecting to go as master of her, and gave a larger price for the share on that account. After his purchase, one-half of the vessel was owned in Damariscotta, Me., and the other half in Portland, Me. He ran the vessel as master for several voyages ; and, the vessel being in New York, he was informed by her agent there that one of the Portland owners had sold out, and that the new purcha-

earned prior or subsequent to the collision.

Whether the same rule would be applied in the case of a foreign vessel, *quære* ;

But, if it would, a vessel owned in New Jersey is not such a foreign vessel as to call for application of any different rule. *The Orient*, 620

See COSTS, 7.

LIEN, 4.

PRACTICE.

ADMIRALTY.

1. The master of a vessel filed a libel against the cargo, to recover freight and demurrage claimed under a charter and bill of lading. The consignee of the cargo, who had sold the cargo and had no interest in it, intervened and gave bonds for the cargo when it was seized under the process. The cargo had been delivered to the purchaser without notice of any claim of lien for freight and after the consignee had signed an agreement agreeing to pay \$150 demurrage, and the consignee in his answer admitted that he was liable for the amount of freight due, but disputed the amount claimed by the vessel :

Held, That as the consignee, who was the only party respondent before the court, was the party really liable to pay what was due, the court would turn the proceeding into an action *in personam*, and give a decree against him for the amount of the freight due, according to the charter, and the \$150 demurrage, which he had agreed to pay, but without interest or costs.

116 *Sticks of Timber*, 86

2. A libel having been filed against D. and R. which averred that "the respondents are in this district or have goods, etc., to wit: the ship *Swallow*," process was issued against D. and R. with a clause of foreign attachment. D. and R. resided out of the district, but had a regular and well-known place of

business within the district, and were usually to be found there during business hours, every day. The marshal made no attempt to find them. He returned to the process that the respondents were "not found" and that he had attached their right, title and interest in the ship. On the return of the process D. and R. failed to appear, their default was taken and a reference ordered. H. and C. claiming to own the ship, finding that she was in custody of the marshal, gave a bond under the Act and the vessel was released. They then moved to compel the marshal to amend his return, and to vacate the attachment and have the bond cancelled. In opposition to the motion, the libellants produced affidavits tending to show that D. and R. under a contract to purchase the ship, had paid a large part of the price, but had not got title to her, and that the debt was due and that D. and R. did not desire to have the motion granted :

Held, That the marshal's return that the respondents were "not found" was a false return : that H. and C. were so interested as to be entitled to make this motion, and were not estopped from making it by having given the bond, and that as there was no dispute about the facts the court could give the relief asked on motion as well as in an action against the marshal for a false return ;

That the marshal must be directed to amend his return by striking out the words "the within respondents not found," that the attachment must be vacated and the bond cancelled, and all proceedings subsequent to the issue and return of process must be set aside. *The Int. Grain Ceiling Co. v. Dill*, 92

3. A libel was filed against a vessel on a bottomry bond. The default of all persons was entered except that of a claimant who was in possession at the time of the attachment of the vessel, claiming under mortgages overdue and unpaid. The vessel was sold and the pro-

ceeds paid into court. Both parties applied for leave to bond the proceeds. The libellants claimed that evidence already taken by the claimant, if unexplained or uncontradicted, established their right to the amount of their bottomry bond as against the vessel:

Held, That, though, in a clear case, when the rights of the libellant were admitted, the court might permit him to take the money from the registry on giving proper security for its return, such was not this case, the libellants' right being denied in the pleadings, and the court would not prejudge it on a partial production of the evidence.

Motion of the libellants denied and motion of the claimant granted.

The Archer, 99

4. A stipulation for value can be substituted for property in custody, at any time, by order of court.

At any time before default, property in custody may be bonded in pursuance of section 941 of the Revised Statutes of the United States, without any other condition than is prescribed in that section:

But whether it can be so bonded as a matter of right, after a default, *quære*. *The Martha C. Burnite*, 196

5. The practice of the State courts in reference to the production of books and papers is not adopted by § 914 of the Revised Statutes of the United States.

U. S. v. Hutton, 268

6. A libel was filed against a domestic vessel on January 25th, 1879, to recover for supplies furnished to her. Process was issued to the marshal, who returned that he had attached the vessel. At the libellant's request, no keeper was put by the marshal on board the vessel, which was then undergoing repairs at City Island. No notice to appear was ever published. On Sept. 16, 1879, on motion of the libellant's proctor, an order was made that the marshal take the vessel into his custody under the

original process and put a keeper on board. The marshal did so, and removed the vessel from City Island to a pier in the East River. H., the shipwright, who had been repairing her, appeared as a claimant, averring that when the vessel was seized by the marshal, he was in possession of the vessel, on which he claimed a common law lien. He gave a bond under the Act of 1847, and an order was made in the usual form for the release of the vessel and the marshal gave him a notice to the keeper on the vessel to discharge her, with which he went to the vessel. C., the master of the vessel, who was also one-sixteenth owner, was on board and so was the proctor for the libellant. A controversy arose between them which resulted in H.'s being arrested by a police officer and compelled to leave the vessel. He had shown the marshal's notice to the keeper, but refused to leave it with him or to show it to the other parties. After his arrest the keeper left the vessel, leaving the vessel in the possession of the master. H. then moved the court for an order directing the marshal to retake the vessel and restore her to him. The master opposed the motion, claiming that he and not the alleged claimant was in possession of the vessel when the marshal retook her under the order of Sept. 16th. The libellant also opposed the motion, denying that he had had notice of the claimant's application to bond the vessel. Pending the motion the court made an order directing the marshal to take the vessel into custody and hold her till the determination of the motion:

Held, That it is the duty of the court, on the dissolution of an attachment against a vessel under its process, to cause the vessel to be restored to the party who was in possession at the time when she was taken under the process;

That, where there are two different parties, each claiming to have been so in possession, the marshal ought not on the dissolution of the at-

tachment to deliver her to either without the order of the court;

That, in this case, the order for the release of the vessel had not been duly executed and the court therefore had jurisdiction to order the marshal to take her into his custody again under the original process;

That the libellant's default as to the bonding of the vessel should be opened and he have leave to file objections to the right of H. to appear as a claimant;

That new publication of notice to all parties to appear be had, on the return of which C., the master, would have the opportunity to appear and aver his possession at the time of seizure; and the question between him and H. could be then properly determined.

The Two Marys, 558

7. A defendant, sued as owner of a vessel, asked leave at the trial to amend answer and set up that he was mortgagee out of possession:

Held, That having pleaded ownership and set up an agreement only consistent with ownership, and having stood by at the trial and applied to amend only after the effort to prove a defence of charter by the other owner had failed, he cannot now be allowed to amend.

McCarthy v. Eggers, 688

See BILL OF PARTICULARS.

CHARTER, 4.

COLLISION, 1.

DEPOSITIONS.

HABEAS CORPUS.

JURISDICTION.

LACHES.

NOTARY.

PROCESS.

STIPULATION.

SUPPLEMENTAL PROCEEDINGS.

PRESUMPTION.

See CHARTER, 5.

PROCEEDS IN REGISTRY.

See PRACTICE, 3.

PROCESS.

Where a libel was filed by C. in one district, and judgment taken by default, and libels were filed by other parties in another, against the same tug, and on proceedings in the second case objection was made to the service of process under C.'s libel by the marshal as irregular:

Held, That the process in C.'s suit was properly served, being served by one T., who had been, by a memorandum endorsed on the process by the marshal, deputized to execute the process;

That neither § 788 of the U. S. Revised Statutes in connection with § 102 of the New York Code of Civil Procedure, nor Admiralty Rule 1 of the Supreme Court required process to be served by the marshal himself or a deputy marshal;

That it would seem that by force of § 788 of the Revised Statutes, which was a re-enactment of § 7 of the Act of 1861, chap. 25 (12 Stat. at Large, p. 425), marshals of the United States have the powers which sheriffs had on the day of the passage of that Act; and if so, the N. Y. Code of Civil Procedure passed in 1877 would not affect such powers;

That the statutes of the United States conferring on marshals similar powers to those exercised by sheriffs, are laws conferring powers only, and not restricting the powers which the marshals already had;

That § 102 of the New York Code of Civil Procedure did not take from sheriffs the power of deputizing other persons to serve process.

There is no rule requiring exclusion of Sunday from the 14 days before return of process.

The E. W. Gorgas, 460

PRODUCTION OF BOOKS AND PAPERS.

1. A foreign railroad corporation, organized under the laws of Illinois and other States, having its principal office in Chicago, had an office in New York, where certain books and papers were kept under the con-

court having been made for their production or inspection. *U. S. v. Hutton*, 268

2. Although a bill of discovery will not lie against the United States, yet under U. S. Rev. Statutes, section 724, which is a re-enactment of the statute of 1789, Ch. 20, section 15, the United States will be compelled to produce the official weigher's returns of the weight of merchandise, on the motion of a defendant sued for a balance of duties alleged to be due thereon, the defence being that the duties are fully paid, and the motion being supported by affidavit that an inspection or copies of the returns is necessary to enable the defendant to prepare for trial :

The remedy given by the statute is not confined to production of books and writings upon the trial. *The U. S. v. Youngs*, 264

3. In a suit brought by the United States to recover duties, the defendants, on proof by affidavit of a demand by their counsel on the collector of the port, for an inspection of the invoices, entries, warehouse bonds, entries for withdrawal and permits, and the custom-house memoranda of payment of duties on the same or in the books of the custom-house in which payment of the duties should be noted, if the same were paid, and of the collector's refusal to exhibit the same, and also on proof by affidavit that they had entrusted the money to make the payments to one of their clerks and that their own books and papers do not furnish means of ascertaining the amount of the duties as liquidated, nor what payments, if any, were made at the custom-house, and that the collector supported his refusal by reference to a regulation of the treasury department, forbidding any person not connected with the custom-house to inspect or have access to or to take copies of any custom-house paper, except upon written application to the collector, stating his personal interest in the application and pro-

viding for a statement to be made on such application to be submitted to the collector and by him furnished to the applicant, if deemed consistent with the public interest and necessary to the rights of individuals (said regulation being made under U. S. R. S. § 251, which authorizes the secretary to make regulations to promote the public convenience and security and to protect the United States as well as individuals from fraud and loss, and regulations not inconsistent with law to be used under and in the enforcement of the laws relating to raising revenue from imports, etc.); and on further proof by affidavit that the defendants could not safely answer the complaint without an inspection of these papers, the defendants having moved for a mandamus against the collector requiring him to exhibit the same or for other relief :

Held, That any regulations made by the secretary under R. S. § 251 not inconsistent with law and fairly within its scope and purpose and not infringing upon any existing legal rights of individuals, have the force of law ;

That such of these custom-house papers as belong to the merchant when delivered to the collector, as, for instance, invoices, continue his property, though required by law to be impounded at the custom-house, and that he has a legal right to inspect them and also other custom-house papers relating to his transactions with the custom-house in respect to his importations, under reasonable restrictions ;

That the regulation referred to, so far as it was calculated to preserve custom-house papers from improper and unauthorized inspection, and to provide a proper and orderly mode for the exercise of the right of access by the merchant having a special interest therein, is a reasonable regulation under R. S. § 251, and not inconsistent with law ;

That, if construed to deny all access to and inspection of said papers by the merchant specially interested therein, it would be inconsistent

with law and so far would be void, but it seems that such is not its necessary or proper construction:

That mandamus is a proper remedy to enforce such right of inspection if denied, but that the circuit and district courts of the United States have no original jurisdiction to issue the writ, but may issue the same in a pending suit under R. S. § 716, "if necessary for the exercise of their jurisdictions and agreeable to the usages and principles of law;"

That under R. S. § 716, the writ could be issued, if in this cause under a lawful order of the court it should become the duty of the plaintiff to permit an inspection of the papers and the performance of that duty should be obstructed by the refusal of the collector to exhibit the same;

That the remedy by mandamus, however, would not lie if the defendant has any other remedy to obtain the same relief;

That the remedy generally open to a defendant to obtain inspection of books and papers is by bill of discovery, and after issue joined by order of the court on motion under R. S. § 724;

That, as this matter of the production of books and papers is expressly regulated by Act of Congress, it is not a matter in which by R. S. § 914 the practice of the State courts, which is broader and allows this relief before issue joined, is adopted;

That the circumstance that the United States cannot be made defendant in a bill of discovery will not be allowed by the court to defeat a substantial right of the defendants which such bill of discovery would have secured to them.
U. S. v. Hutton, 268

4. A witness examined *de bene esse* under U. S. R. S., § 863, may be compelled to produce books and papers in his possession which would be material and competent evidence for the party calling him, upon the trial of the cause, but he cannot be compelled to produce his

books and papers merely for the purpose of refreshing his memory.

The U. S. v. Tilden, 566

See PRACTICE, 2, 5.

R

RATE OF EXCHANGE.

See BILL OF LADING, 4.

RES ADJUDICATA.

See REMISSION OF FORFEITURE.

RELIQUIDATION OF DUTY.

After the collector has liquidated the duty on imported goods, and the duty has been paid and the goods delivered to the importer, no part of the same nor any samples being retained by the collector, he has no power to make a reliquidation upon a subsequent report of an appraiser who never saw the goods.

The year, within which, under Stat. 1874, ch. 391, § 21, the collector can reliquidate the duty, runs from the time of the presentation to the collector of the "entry" by the importer, and not from the time of the first liquidation of the duty.

The U. S. v. Frazer, 347

REMISSION OF FORFEITURE.

1. A suit was commenced by the United States against V. & Co. to recover the value of goods alleged to have been entered by them in violation of the 1st section of the Act of Congress of March 3, 1863. While it was pending, proceedings in bankruptcy were commenced against V. & Co., and B. was appointed assignee. Thereafter the attorney for V. & Co. in that suit withdrew a plea in bar and filed a *cognovit* that judgment be entered, and it was entered accordingly for \$99,951.25. At the first meeting of creditors, the United States District Attorney appeared and filed a proof of debt, setting forth that judgment. The assignee excepted to the proof and on the matter being certified to

the court, it was held that the claim was provable in bankruptcy, on the basis of the facts out of which the liability arose. The matter was referred to the Register to take proof of the validity and amount of the claim. He reported, and on the 18th of August, 1874, the judge decided that the United States was entitled to prove for the amount of the claim. No formal order to that effect was signed by the judge, but a minute to that effect was endorsed by him on the papers, and from that decision the assignee appealed to the Circuit Court, which affirmed the decision. The assignee then filed a petition for remission, and an order was made, referring it to a commissioner to inquire as to the facts of the case. After this order a formal order was entered *nunc pro tunc*, in conformity to the minute of the District Judge of August 18th, 1874. The commissioner having made his report, and the same having been certified to the Secretary of the Treasury for decision, and having been by him returned to the commissioner for revision, the United States District Attorney moved for an order dismissing the proceedings on the petition for remission, claiming that it was not competent for the Secretary of the Treasury to give a remission in the case:

Held, That, the court having been informed by the judge, before whom the petition for remission came, and by whom the order of reference to a commissioner was made, that substantially the same ground was then taken by the District Attorney and overruled by the court, that ruling, having been submitted to and never reversed, must be regarded as the settled law of the court, or at any rate, of the case;

That it made no difference that since that time the order had been entered *nunc pro tunc* on the minute of the judge of August 18th, 1874;

That that minute under the circumstances of this case was to be held to have the same effect as if the order had been then entered on it;

That the motion to dismiss the petition must be denied.

The District Attorney also moved that the petitioner be compelled to make the record of the case a part of his petition:

Held, That the United States might prove the facts embodied in the record, but that this motion also must be denied. *Barnes's Case*, 79

SAFE RETURN OF VESSEL.

C., a minority owner of a brig, filed a libel against her to obtain security for her safe return from a voyage from which he had dissented. The majority owners appeared and agreed to give the security, the vessel was appraised and the security for the interest of C. was given and the vessel was released and sailed on the voyage. The security was a stipulation, entitled and filed in the cause, in the sum of \$1,300, conditioned on the vessel's safely returning "from the said voyage to the port of New York."

Afterwards C. filed a supplemental libel, in which he averred the proceedings above mentioned, and that the vessel never returned to the port of New York but was lost at sea. The claimants answered, averring that the vessel returned from the voyage dissented from, to Boston, and was then sent without objection from C. on another voyage, on which she was lost, which was claimed to have been a satisfaction of the stipulation, and setting up also that at the time when the action commenced there were outstanding bills against the vessel, which the majority owners had since paid, and that they were entitled to have the share of such bills which belonged to C. to pay, deducted from any amount due on the stipulation:

Held, That the return of the vessel to Boston did not satisfy the stipulation, which was conditioned on her returning to New York;

That the vessel having been lost, the liability of the stipulators to pay the amount of their stipulation was absolute. But they were not liable

for interest during the absence of the vessel:

That the amount which might be found due upon an accounting between the majority owners and C. could not be applied to diminish the liability of the stipulators for the full amount of their stipulation.
The Susan E. Voorhees, 380

SALE OF CARGO.

A bark sailed from Philadelphia with a cargo of corn, bound to Cork for orders. She met with heavy weather and put into Bermuda in distress, where, on the recommendation of surveyors, part of the cargo was discharged, being found to be heating, wet and damaged, and the vessel was repaired. While the cargo was being reloaded it was found to be again heating, and, a survey being called, the surveyors recommended that part of it be again discharged and cooled. While this was being done the master went to Philadelphia and informed the underwriters and the shipper of the corn of the situation of affairs. Neither the underwriters nor the shipper gave him any instructions. The latter told him they had sold the corn to a London house whose name they gave to the interpreter who accompanied him, he being an Italian and speaking no English. The master sent no information to the London house, but returned to Bermuda. After his return to Bermuda another survey was held, which reported the corn, as well that which was discharged as some 8,500 bushels still on board, as being unfit to proceed on the voyage to Europe, and therefore recommended its sale. Previous to the sale the master made an agreement with one Gray, by which if Gray bought 10,000 bushels of the corn the master was to carry it to New York, free of freight, but was to have half the profit arising on its sale in New York. The cargo was sold and Gray bought 11,000 bushels, including the 8,500 bushels which had never been discharged from the vessel, and the master

carried it in the bark to New York. The master acted in what he did with the knowledge and concurrence of the agent of the underwriters. The corn which was carried to New York arrived there in good shipping condition for Europe. It was sold there for four times what Gray paid for it, but for about 6 cents a bushel less than sound corn, and was immediately shipped to Europe by the purchaser. The London house, which had purchased the cargo from the shipper, filed a libel against the vessel for breach of the charter party under which the cargo had been shipped, in that the vessel had not proceeded to Cork for orders with the cargo. The owners of the vessel set up as a defence that the voyage had been broken up by perils of the sea, and the condition of the cargo:
Held, That the agreement made by the master with Gray was one which should subject his acts and motives to the closest scrutiny and throw upon him the burden of showing that it was made in entire good faith;

That the facts attending the condition and sale of the cargo in New York were not sufficient to overthrow the evidence that, when it was sold in Bermuda, it was not in a condition to be carried forward to Europe;

That the master was not bound under the circumstances of the case to have communicated with the owners of the cargo before selling;

That he was not authorized to bring the cargo to New York for account of its owners;

That the sale of the cargo by the master was justified under the circumstances, and that the libel must be dismissed. *The Veronica Madre*, 24

See BILL OF LADING, 3.
PASSENGER.
DAMAGE TO CARGO, 1.

SALE OF VESSEL.

1. The Admiralty has jurisdiction to order the sale of a vessel on the application of the owners of one-half of her, in case of a disagreement

between them and the owners of the other half. But such disagreement must be such as prevents the present employment of the ship, and the owners asking for a sale must either propose a different employment of the ship, or, if they merely object to the voyage or the master proposed by the other moiety, their objection must be based on reasonable grounds.

The Annie H. Smith. 110

2. The owners of half a ship applied to the court for a decree of sale. It appeared that, at the time of filing the libel, the ship was loading in New York under a charter for San Francisco. Some of the owners of the vessel resided in New York and some in Maine, and, when she had been in New York before, some of her business had been done by S. & Co., who, together with the father of S., owned and controlled one-half of the ship. S. had accepted this charter while the vessel was yet at sea, after a conference with his father who was in Maine and made some effort to consult with the Maine owners. After the charter had been accepted L., who represented the owners of the other half of the ship, came to New York and, having inquired of S. if she was chartered and received an evasive answer, then informed S. that, as representing the owners of the other half, he did not wish the ship chartered. S. then told him the ship was chartered. L. did not then repudiate the charter or take any steps to prevent the signing of the charter party by the master, which was done after the arrival of the ship in New York. There was dissatisfaction on the part of L. and those owners who acted with him as to the agency of S. & Co. or the father of S., and as to some previous transactions in reference to the ship; and after the vessel was partly loaded, L. and the other owners for whom he acted filed a libel against the ship and the owners of the other half to obtain a sale:

Held, That, under the circumstances of the case, the libellants had not

shown sufficient grounds to call on the court to exercise the discretionary power of sale;

That evidence tending to show that as to part of the vessel, to which L. held the legal title, the master of the vessel held an equitable interest by reason of which he had intervened in the cause and answered, opposing the sale, was admissible in order to show to the court all the circumstances in the face of which it was called to exercise its discretion. *The Annie H. Smith*, 110

3. Libels were filed against a tug to recover for loss of barges while in her tow. The claimant of the tug set up in defence that after the loss the tug was libelled in another district, to recover a valid claim and was sold under decree by default in that case, and that the lien of libellants in that present case was discharged thereby. Libellants claimed to show that the proceedings in the other district were irregular and offered evidence to prove that D., the present claimant, was master of the tug at the time of the loss of their barges, and that the sale of the tug in the suit of C. in the other district was collusive;

Held, That, on the evidence, the sale in C.'s suit was not collusive.

That D. was not bound to notify libellants that C.'s suit was commenced, or that the tug was to be sold under decree therein, nor was he prevented from buying the tug at the sale, nor was the effect of the sale to clear the tug from all liens lessened by D.'s having bought her; That D. was not equitably estopped from setting up the decree in C.'s suit and the sale under it against the claims of the libellants.

That if the sale of the vessel had been unfair or for an inadequate price, the libellants who knew of the sale within two days after it took place, might have sought a remedy by applying to the court of the other District to set aside its sale and open their default and let them in to defend against C's claim, if they had any defence;

That having failed to do this, their rights as against the tug were cut off by her sale, and their libels must be dismissed.

The E. W. Gorgas, 460

See JURISDICTION.

SAILING ON SHARES.

See LIMITATION OF LIABILITY, 1.

S

SALVAGE.

The steamer C., while on a voyage from New York to Colon, became disabled on the 20th of August, 1876, by the breaking of her crank-shaft. She was otherwise tight and staunch, was provisioned for several months, and could make some progress under sail. She was then about 200 miles from Nassau, N. P., and about 731 miles from New York, for which port her master determined to make. The weather was fine and the sea smooth. During that afternoon the steamer E., bound from Kingston, Jamaica, to New York, in answer to a signal from the C. came alongside, and an agreement was made between the masters of the two vessels that, the C., having requested to be towed by the E. to New York, the compensation for the assistance rendered should be settled by the companies in interest in New York. Each vessel furnished its hawser for the service, and the E. reached New York in safety with the C. in tow on the morning of August 26th, the weather during the voyage being fine, and the winds favorable. The C. was worth about \$230,000, and her cargo was worth about \$250,000, and she had 140 passengers. The E. was worth about \$120,000. Her cargo was worth about \$100,000, and she had thirty-nine passengers. She was detained about two days and a half in rendering the service. No agreement as to the amount of compensation for the services of the E. was arrived at between the

owners of the two vessels. Two days after their arrival the owners of the E. demanded \$150,000 salvage, and the next day filed their libel and attached the C. and her cargo for that amount. There was delay in furnishing security; and the transshipment of the cargo of the C. to another vessel of the line to which she belonged, and the sailing of that vessel were delayed thereby.

Part of the cargo of the E. consisted of fruit, and its consignees intervened in the suit, claiming to recover the damages caused to such part of the cargo by the delay. It had been shipped under bills of lading which in terms authorized the E. to tow and assist vessels in all situations. On behalf of the E. it was claimed that she had been put to expense, amounting to \$2,340, and that she had lost \$2,500 freight on her next trip, but this latter claim was abandoned on the trial:

Held, That the service rendered was a salvage service, but that the claim of the E. was exorbitant;

That the dangers to which both vessels were exposed during the service had been exaggerated;

That the policies of insurance on the E. and her cargo not having been produced, the presumption was that by their terms the E. was authorized to render such services;

That \$10,000 was a reasonable compensation to the E. and her ship's company for the service rendered, \$500 of it to be paid to the owners of the E. for expenses, \$750 to the master of the E., and the rest, half to the owners of the E. and the other half to be divided among the officers of the E., including the master and her crew, according to their wages;

That the owners of the cargo of the E. who had intervened might also recover the damages which they had sustained by reason of the detention, such damages being the difference between the value of their cargo when delivered and what would have been its value if delivered without detention; and that their right to recover such

damages was not affected by the above mentioned clause in the bills of lading under which the cargo was shipped ;

The Colon and her cargo, 60

See COSTS, 3, 7.

DAMAGE TO CARGO, 4.

PRIORITY.

SEAMEN'S WAGES, 1.

SHIPPING COMMISSIONER.

See SEAMEN'S WAGES, 9.

SEAMEN'S WAGES.

1. A steamer went ashore on February 4, 1876. The master did not abandon hope of getting the vessel off till March 10th. Up to February 16th the crew remained on the shore by the vessel, engaged under the master's orders in taking the cargo out and stripping the vessel. On the 16th of February the provisions gave out, and the crew were sent to Nassau, N. P., where they were retained by the master's direction till March 10th, when they were discharged. They were paid wages up till February 4th, and on returning to New York they filed a libel against the owners, claiming to recover wages up to March 10th. The owners defended, claiming that under § 4526 of the Revised Statutes of the United States, the seamen's right to wages ceased on the wreck of the vessel on February 4th, and that for their subsequent services they would be entitled only to salvage compensation, to be paid out of the proceeds of the wreck :

Held, That the seamen were bound to continue their services as long as there was any hope of saving the ship ; that the master must be held to have the power, as a general rule, to determine whether there is any hope of getting the ship afloat, and until he gives it up, the owners cannot object to paying wages on the ground that there was no chance of saving her ; and that the libellants, therefore, were entitled to recover. *Tarleton v. Malory,* 46

2. C. signed shipping articles at Cobourg, Canada, to go on board of a yacht as sailing master, on a voyage to Philadelphia, at a rate of wages of \$1 a day. Subsequently, but on the same day, an agreement was made between C., G. and B., which, after setting forth that C. had begun to build the yacht, but had not been able to finish her, and had put the title in G., provided that G. should hold the yacht in trust for C., B. and G. himself ; that G. should manage her, and after she had gone to New York and Philadelphia, should sell her, and from the proceeds, after paying all debts due, should pay certain sums to B., C. and himself, and that C. should go as sailing master at \$60 a month. The yacht having come to New York, C. filed a libel against her for wages :

Held, That the right of C. must be governed by the agreement and not by the articles ;

That under that agreement C. must be held to have waived any right of lien on the vessel for wages ;

That as the vessel was a foreign vessel and the contract was made in a foreign port, section 4535 of the U. S. Revised Statutes could have no effect in the case ;

That the court could not presume that the statutory law of the Dominion of Canada is the same as that of the United States.

In the absence of any evidence as to the law of the place where the contract was made and to be in a substantial part performed, the law maritime will be presumed to be the law controlling the mariner's contract. By that law it is competent for the mariner, by his agreement understandingly made in a proper case, to waive his lien for wages. *The Countess of Dufferin,* 155

3. O. M. bought a schooner at Bermuda, took command of her, and brought her to New York. As she needed repairs, he obtained an advance of the necessary funds, agreeing to give a mortgage on her as security therefor. It was found

that she could not be registered in the name of O. M., and he made a bill of sale of her to his brother, E. M., for the nominal consideration of five dollars, and procured E. M. to execute the mortgage. The mortgagees were told by O. M. that he had sold the vessel to his brother, and they had no notice that the sale was not a valid sale, except knowledge of the consideration stated in the bill of sale. After the mortgage O. M., who continued to control the vessel, shipped E. M. as cook and sailed on a voyage to Cuba and back to New York, where the vessel was libelled and sold for seaman's wages. The mortgagees intervened as claimants and objected to the payment of the claim of E. M. :

Held, That, although the claim of the mortgagees to the proceeds was superior to that of E. M. as owner, the claim of E. M. as a seaman was superior to that of the mortgagees, and there was no reason why it should not be recognized and enforced :

That the liability of E. M. for a deficiency on the mortgage could not be set off against his claim for wages. *The Uncle Tom*, 234

4. A pilot was employed on a propeller, engaged in making short trips in and about the harbor of New York, by the month. His month expired on Sept. 24th. On Sept. 25th, the boat was seized by the marshal under process issued on libels against her. She at once stopped running. Her master abandoned her and the rest of the crew libelled her for their wages. The pilot, who had been living on board, thereafter lived at home, but he went on board the boat every day of his own accord, and pumped her out. The vessel being sold by the marshal, the pilot claimed to recover wages up to the time of her sale :

Held, That the libellant had reasonable notice on the seizure of the boat that his services as a pilot were no longer required, and his right to wages terminated at that time.

The Joseph Hall

246

5. A steamer left New York on a voyage to Nassau, N. P., thence to Cuba and back to New York. Just before reaching Nassau she struck a rock and was so injured that, after she reached Nassau, a survey was called on the application of her master, and the surveyors recommended that she be condemned as unseaworthy, and thereafter the owners abandoned her to the underwriters. After the survey the master discharged the crew and offered them a passage to New York. Seventeen of them accepted the offer and came home to New York. The other eight refused the offer, claiming that the ship could be brought home ; and they remained at Nassau for more than a month, during which time the master allowed them to sleep on board and he provided food for them. On the arrival of the seventeen at New York they claimed to be paid wages up to the time of their arrival besides three months' extra pay. The owners of the steamer refused to pay wages after the day when she was injured. The other eight, after their return to New York, made a similar claim, and suits were brought against the owners to recover the wages :

Held, That, by the proceedings taken as to the vessel, she was "condemned" as mentioned in section 4582 of the U. S. Rev. Stat. and the sailors therefore were not entitled to the three months' extra pay :

That the sailors were entitled to be paid up to the time of their discharge by the master in Nassau, and no later ;

That the seventeen were entitled to the ten days' extra pay provided by section 4529, because there was no sufficient cause for the delay in payment ;

That the act of the master at Nassau, in allowing them to sleep on board, and furnishing food for them after their discharge, did not entitle them to claim wages after such discharge.

Gallagher v. Murray,

290

6. A second mate of a vessel filed a libel against her, to recover \$91.75,

for wages. The amount of his wages was admitted, but the owners of the ship set up as an offset, that he had wrongfully assaulted one of the sailors on the voyage, to the damage of the ship of \$120. The assault and the damage were proved. But the libellant urged that as the deduction was not claimed in the statement of wages made by the master to the shipping commissioner, nor entered in the log, the defence could not be made:

Held, That as the log was not produced, the presumption was that the entry was not made in the log; That under §§ 4550 and 4596, the court has a discretion to reject the evidence offered, but that this does not prevent proof being given of the facts, and that as the facts were proved beyond dispute, the owners were entitled to the set-off, and the libel must be dismissed.

The Bark T. F. Whiton, 369.

7. Seamen filed a libel against a British vessel to recover wages. The owners of the vessel objected to the court's entertaining jurisdiction of the cause, and the British consul also protested against it:

Held, That, while under such circumstances, the court would refuse to entertain jurisdiction unless there were special circumstances in the case, yet in this case, as none of the seamen belonged in Nova Scotia, where the vessel belonged, and when the libel was filed it was uncertain for what port the vessel would sail, and when the cause was heard the vessel had finished her voyage and it was uncertain where she was, a refusal to entertain the cause would be practically a denial of justice and the same would be entertained;

That the 190th section of the British Merchant's Shipping Act did not preclude the sailors from maintaining the action. *The Lilian M. Vigus*, 385

8. A libel by seamen alleged a wrongful discharge from the vessel, in the port of New York, and the answer set up as a defence that the men had deserted. On the

trial, the libellants were allowed to amend their libel so as to allege a refusal by the master of the vessel to furnish proper food and other ill treatment by him, by reason of which their contract was broken. It appeared on the trial that the men had complained of being compelled to work more hours in port than they thought was right, and that whatever refusal of food there had been, had been in consequence of their refusal to work. The men complained to the consul, who heard their case and decided that they must go back to the ship and go to work, whereupon they went back to the ship, got their clothes and left her. Entry of their having left had been made in the official log by a person not attached to the ship, but under the captain's direction. The entry was not made on that day, and the date when the entry was made was not stated in the entry:

Held, That the lack of the date when the entry was made was fatal to the value of the entry as a proof of desertion of the men under §§ 244, 250 and 281 of the British Merchants Shipping Act:

That the certificate of the British consul that he had examined the entry and that the desertion was properly entered would be disregarded, inasmuch as it was not made to appear that the fact of the entry's not having been made on the day of the occurrence was made known to him;

That the circumstances of the case, as shown in the evidence, did not show a justification of the seamen in leaving the ship, but that their so doing was so far mitigated by evidence of apparent connivance on the part of the second mate in efforts by boarding-house keepers to induce them to desert, that the court would not hold that their wages were forfeited, and that the libellants might recover the amount of wages due. *The Lilian M. Vigus*, 385

9. The master of a vessel, which had returned to New York from a voy-

§ 4550, Discharge,	369
§ 4582, Extra Wages,	290
§ 5278, Fugitive from Justice,	198
STATUTES OF NEW YORK.	
Rev. Stat., 1813, p. 421, § 5,	478
“ “ 379, § 73,	472
Laws of 1862, ch. 482, § 2 (Lien),	188; 554
1875, ch. 482,	
Code of Procedure, § 102,	461
§ 858,	163
§ 1487,	
190, 548, 549	
STATUTE OF ILLINOIS.	
R. S. 283, § 16.	163
ENGLISH STATUTES.	
1 William IV. 22 (6 Eng. R. S. 849),	577
Merchants Shipping Act, 190,	
281,	385, 386
FRENCH STATUTES.	
Marine Code, Art. 6,	114

S

STIPULATION AND SURETY.

1. In an action against property for violation of the Internal Revenue Laws, L. appeared as claimant of the property seized and gave a stipulation with O. as surety, in which L. was named as proctor of the claimant. The decree in the District Court being in favor of the United States, L. took the case by writ of error to the Circuit Court, and gave his own personal bond on the writ of error, which was approved by the judge in the usual form. The decree was affirmed by the Circuit Court and a writ of error was taken to the Supreme Court, on which L. again gave his personal bond without surety by consent of the district attorney; and this bond was also approved by the judge in the usual form. The Supreme Court affirmed that decree and a final decree was entered, and an order was made that notice be given to the sureties on the first stipulation to perform their stipu-

lation or show cause why execution should not issue against them. Other proctors had during the progress of the cause been substituted for L. and this notice was served on such other proctors, who had agreed to notify O. of the entry of any decree. They failed to do so, however, and O. had in fact no notice, and an order was made by default that execution issue and it was issued accordingly. O. thereupon applied to open the default and to be allowed to come in and show cause and that the execution be set aside, claiming that the taking of the bonds on the appeals without surety and with the approval of the district attorney had discharged him, and that L. had given to the plaintiff \$75,000 in government bonds as further security, which bonds it was alleged had been stolen :

Held, That the default against the surety might be opened if he had shown any meritorious defence, but that the facts put forward by him furnished no defence against his liability on the stipulation.

The U. S. v. A Quantity of Manufactured Tobacco, 9

2. Certain goods having been proceeded against as smuggled, the owner appeared as claimant and gave stipulation for value in a sum agreed upon between the claimant and the district attorney. Afterwards a final decree was entered against the claimant on default. On return of the order to show cause against the stipulators why execution should not issue against them for the amount of the stipulation :

Held, That they were not entitled to a reduction of the amount of the stipulation on the ground that the claimant after the giving of the stipulation and before the delivery of the goods to her had paid the duties, and that the amount of the stipulation was for the estimated foreign value of the goods with the duty added; nor on the ground that while the goods were under seizure, and before the stipulation

was given, they were injured by being carelessly handled by persons in the employ of the collector and by visitors who, by their consent, had access to them, and that the stipulation was given for a larger amount than the true value of the goods at the time it was given.

The U. S. v. Two Trunks, etc., 374

2. A libel being filed against a man and his wife, and process with a cause of foreign attachment having issued, the marshal attached property. The wife filed a claim to the property and gave a bond under the Act of 1847. The libellant examined the sureties as to their sufficiency and they having justified, the property was discharged. The cause was thereafter tried and resulted in a decree in favor of the libellant against the husband, and a dismissal of the libel against the wife. The libellant moved for a decree that the sureties on the bond pay the decree against the husband, on the ground that it had appeared on the trial that the property attached and delivered up on the giving of the bond, was really the property of the husband:

Held, That, whether it was irregular practice or not, to file a claim in an action *in personam*, nevertheless the sureties could not be held beyond the terms of the bond which they had signed; and that by that bond they had only become sureties for the performance by the wife of any decree against her and could not be called on to pay the decree against the husband.

Jagoe v. Chapman,

517

SUCCESSION TAX.

The person liable to pay a tax on a "succession" under sections 126 to 137 of the Act of June 30th, 1894 (33 Stat. at Large, p. 287), is the person beneficially interested in the property, and not the trustee or executor in whom the legal title is vested, or to whom a power in trust is given for the benefit of such person. *The U. S. v. Tappan*, 284

SUPPLEMENTARY PROCEEDINGS.

In a suit *in rem* for forfeiture, after return of execution against the stipulators unsatisfied, proceedings supplementary to execution in accordance with the laws of New York are properly taken. *A Quantity of Manufactured Tobacco*, 447

See PRACTICE, 4.

SAFE RETURN.

SUBPENA *Duces Tecum*.

See PRODUCTION OF BOOKS AND PAPERS.

SUNDAY.

See PROCESS.

SURVEY.

See DAMAGE TO CARGO, 1.

T

TENDER.

See BILL OF LADING, 3.

COSTS, 8.

DAMAGE TO CARGO, 5.

SEAMEN'S WAGES, 9.

TIME.

See PROCESS.

RELIQUIDATION.

BILL OF LADING.

TUG AND TOW.

1. A libel was filed by the owner of the canal boat M., averring that an agreement was made by her owner with the owner of a tow-boat to tow the M. from New York to Troy for \$15: that the \$15 was paid and the M. was ready at the appointed place to be taken in tow, and that the tow-boat made the voyage but refused to give the M. a place in her tow and neglected to tow her as agreed, whereby damage accrued, for which the tow-boat was sought to be made liable *in rem*. The owner of the tow-boat excepted to the libel, claiming that the facts showed an executory contract, not binding on the tow-boat, and out of a refusal to perform which no lien attaches to the boat:

Held, That the facts set up in the libel constituted a good cause of action *in rem* against the tow-boat.

The James McMahon, 103

2. A tug and tow was lying at the long dock at Piermont on the Hudson river. There was a large cake of ice in the river below, which had been blown over to the east shore, leaving a clear passage for the tug and tow along the west shore. The tug thereupon started from the dock. While she was passing the ice, a corner of it caught on the east shore so that when the ebb tide made, the cake of ice was turned in the river so as to close in on the tug and tow, and force her ashore before it was possible to escape. Libels being filed by each boat of the tow against the tug, for damages occasioned :

Held, That the master of the tug was not negligent in starting from the dock, and that the tug was not liable for the damage to the tow.

The Gen. Wm. McCandless, 453

3. Where a tug going up the Hudson river with several boats in tow, could not land one of the boats at the dock where it was destined in the then state of the tide, and left it at another safe place, to await the return of the tug on the next tide, and the boat having to be moved out of the way of other boats, was put by her master in a place where she took bottom before the next tide, and suffered damage for which action was brought :

Held, That it was not negligent in the tug to leave the boat in a safe place, where she did, to await the next tide ;

That it was negligent in the master of the tug to move his boat to an unsafe place, when there were other places open to him and known to be safe ; and the libel must be dismissed ;

That the failure of the tug to return at the next tide showed a willingness to disregard the welfare of her tow, for which she should be refused costs.

A boat left by her tug to wait for her, in order to complete the towing

contract, at a place which though safe cannot be retained and from which the boat must move to an unsafe place, is not left in a safe place. *The P. C. Schultz*, 536

4. The tug G. having towed three canal-boats out of a slip at Jersey City into the river, all three on her port hand in the neighborhood of the ferry from Desbrosses street, in order to take one of the boats, the N., on the other side, her lines were slacked and she was dropped back till her stem was ten or fifteen feet from the sterns of the other two boats, and a line was made fast from her to one of the other boats. In this position the N. was run into by a ferry-boat crossing from New York to Jersey City. When the approach of the ferry-boat was seen, the master of the N. hailed the tug to go ahead, but the hail was not heard. The master of one of the other boats went forward abreast of the pilot-house of the tug and spoke to the master of the tug, but he failed to start his boat ahead in time to get the N. out of the way of the ferry-boat, and the owner of the N. filed a libel against the tug to recover the damages sustained by the N. The N. had no light on her at the time of the collision, and was not seen by the ferry-boat in time :

Held, That the place chosen by the tug in which to shift the canal-boat was not well chosen, being in the track of the ferry-boat, and that the master of the tug was bound to greater vigilance therefore ;

That the master of the tug was not as vigilant as he should have been, in that he did not see the approach of the ferry-boat in time, and did not start ahead with his tug when warned to do so ;

That the tug was liable for the damages to the boat.

It seems that the rules of the inspectors throw the duty of seeing that a boat in tow has a light, upon the steam-tug and not on the boat, and that there is no such duty on the part of the boat to have a light that the failure to have one constitutes

When the tide did not serve till 1

When the tide did not serve till 1
and she accordingly made fast
at the end of her pier. She was so
long that she overtopped the piers
on either side, and a line was
run from her bow to the pier which
was attached to her bow, for her
security while waiting the

The C. did not "make
fast" within the mean-
ing of the act of the State
of New York, and that the owner
of the pier was not entitled to re-
cover against her for wharfage

The City of Hartford

108

When the tide did not serve till 1
and she accordingly made fast
at the end of her pier. She was so
long that she overtopped the piers
on either side, and a line was
run from her bow to the pier which
was attached to her bow, for her
security while waiting the

The C. did not "make
fast" within the mean-
ing of the act of the State
of New York, and that the owner
of the pier was not entitled to re-
cover against her for wharfage
The City of Hartford

See COSTS, 1, 3, 5, 16
Costs, 11.
DAMAGES, 2

USAGE

See EVIDENCE, 1.

V

VERIFICATION.

See NOTARY AND SEAL.

W

WEIGHER'S RETURN.

See PRODUCTION OF BOOKS AND
PAPERS.

WHARFAGE.

1. The C. was a large steamship,
having a regular berth at a pier,
which she could enter with safety
only at slack water. She arrived
at her berth one day at 10 a. m.,

2. A steamboat, 272 feet long, oc-
cupied a berth at a bulkhead in the
city of New York for 28 days.
The bulkhead was owned by three
parties. B. owned one hundred
feet of it all of which was occu-
pied by the steamboat or by lines
which ran from her bow forward
to a spile at the corner of the bulk-
head. F. owned the hundred feet
next, all of which was occupied,
and K. owned one hundred and
fifty feet next, seventy-five feet of
which was occupied. The rate of
wharfage which, by the statute of
the State of New York, the steam-
boat would be called on to pay for
a single berth was \$9.50 a day. B.
filed a libel, claiming to recover of
her for wharfage \$9.50 a day. The
owners of the steamboat claimed
that he was only entitled to his
proportionate share of the \$9.50 a
day and tendered and paid into
court \$89.22:

Held, That the libellant was not en-
titled to recover \$9.50 a day, but
only his proportionate share of that
sum, viz., $\frac{1}{3}$ of it, and without
costs. *The City of Hartford*, 150

See COSTS, 4, 9.

WITNESS.

See PRODUCTION OF BOOKS AND
PAPERS.

WRECK.

See SEAMEN'S WAGES, 1, 3.

11

12

13

14

15

16

17

18



3 6105 063 256 924

